89-618

No. _____

In The

Supreme Court of the United States

October Term, 1989

JOHN J. BRUNO and JOHN W. MENDICINO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. May an individual be convicted of "causing", within the meaning of 18 U.S.C. §2(b), a financial institution not to file a currency transaction report ("CTR"), as required by 31 U.S.C. §5313(a) (1982), and the regulation thereunder, 31 C.F.R. §103.22(a) (1986), for making multiple currency deposits, each in an amount under $10,000 but aggregating over $10,000, in one day at one bank, so that the event that would have triggered a filing obligation, *i.e.*, a physical transfer of more than $10,000 in currency, never occurred?

2. Should all business records seized from the office of the corporation owned by Petitioners have been suppressed because:

   A. the warrant authorized, and the executing officers conducted, a general search; and

   B. the good faith exception to the exclusionary rule is inapplicable when a warrant is obviously invalid and the executing officers exceed its scope?

PARTIES TO THE PROCEEDING IN THE COURT BELOW

American Investors of Pittsburgh, Inc.

John J. Bruno

Charles Krzywicki

John W. Mendicino

Alan Zytnick

United States of America (Office of the United States Attorney for the Western District of Pennsylvania)

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Petitioners John J. Bruno and John W. Mendicino respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the proceeding on June 29, 1989.

OPINIONS IN COURTS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, rendered on June 29, 1989, is published at *United States v. American Investors of Pittsburgh, Inc.*, 879 F.2d 1087 (3d Cir. 1989).

The United States District Court for the Western District of Pennsylvania did not render an opinion concerning the question under the Currency and Foreign Transactions Reporting Act, 31 U.S.C. §§ 5311-5322 (1982) (the "Reporting Act"). The district court opinion concerning the fourth amendment question, rendered on October 22, 1984, is not published and is reproduced in the Appendix.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on June 29, 1989. By orders dated August 10, 1989, the court of appeals denied rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitution
Amendment IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the . . . things to be seized."

United States Constitution
Amendment V – "Due Process" Clause

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . "

31 U.S.C. § 5313(a) (1982)
Reports on domestic coins and currency transactions

"When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made."

31 C.F.R. § 103.22(a) (1986)
Reports of currency transactions

"Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000. Such reports shall be made on forms prescribed by the Secretary and all information called for in the forms shall be furnished."

31 C.F.R. § 103.11 (1986)
Definitions – Meaning of terms

"*Transaction in currency.* A transaction involving the physical transfer of currency from one person to another."

18 U.S.C. § 2
Principals

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

'(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

18 U.S.C. § 371
Conspiracy to commit offense or to defraud United States

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner for any purpose, and one or more of such persons do any act

to effect the object of the conspiracy, each [commits a crime]."

STATEMENT OF THE CASE

Procedural History

A. Search Warrant

On May 13, 1983, a United States magistrate in the Western District of Pennsylvania issued a warrant (the "Warrant") authorizing a search of the office of American Investors of Pittsburgh, Inc. ("AIP"). On August 4, 1983, AIP and Petitioners Bruno and Mendicino, president and executive vice president of AIP respectively, moved, pursuant to Rule 41(e), F.R.Crim.P., for the return and suppression of all documents seized pursuant to the Warrant. After a hearing, the Honorable Hubert I. Teitelbaum, then Chief United States District Judge for the Western District of Pennsylvania, by order dated October 22, 1984, granted the motion with respect to 46,000 documents, the seizure of which was held not to have been authorized by the Warrant, and denied the motion as to the other 103,000 documents seized under the Warrant. No appeal was taken from Judge Teitelbaum's order. *See United States v. Furina*, 707 F.2d 82 (3d Cir. 1983).

B. Indictment, Trial, Sentence and Appeal

On April 30, 1987, a grand jury sitting in the Western District of Pennsylvania returned a 156 count indictment

against AIP, Bruno, Mendicino, and three other individuals. The following chart summarizes the violations charged against Bruno and Mendicino:

Counts	Statutory Violations Charged	Nature of Violations Charged
1	18 U.S.C. § 371	conspiracy to violate 18 U.S.C. § 1001, by concealing from IRS and SEC currency received by AIP, and to violate 31 U.S.C. § 5313, by AIP not filing CTRs, and by causing Pittsburgh National Bank ("PNB") not to file CTRs;
2-47	31 U.S.C. § 5313(a), 18 U.S.C. § 2(a)	aiding and abetting AIP's failures to file CTRs for currency received from its customers;
48-94	31 U.S.C. § 5313(a), 18 U.S.C. § 2(b)	causing PNB to fail to file CTRs for currency deposited by AIP and received by it from its customers;
95-156	18 U.S.C. §§ 1001, 2(a)	aiding and abetting concealment from SEC of currency AIP received from its customers by entering "payment" in "blotters".

Trial commenced on October 26, 1987 before the Honorable Glenn E. Mencer, United States District Judge, and

a jury. On November 13, 1987, after the conclusion of the government's case, Judge Mencer granted all defendants' motions for judgments of acquittal on counts 95-156, the fraudulent concealment charges. The trial concluded on December 3, 1987, when the jury returned guilty verdicts against Bruno and Mendicino on all remaining counts.

On March 14, 1988, Judge Mencer sentenced Petitioners:

Counts	Bruno	Mendicino
1	two year term of imprisonment;	two year term of imprisonment;
2	$25,000 fine;	$10,000 fine;
3-94	three month terms of imprisonment, concurrent with each other and term of imprisonment on count 1;	three month terms of imprisonment, concurrent with each other and term of imprisonment on count 1.

Petitioners timely filed notices of appeal on March 22, 1988. After oral argument on December 1, 1988, the United States Court of Appeals for the Third Circuit, on June 29, 1989, entered judgment affirming the judgments of conviction. By orders dated August 10, 1989, the court of appeals denied rehearing, Chief Judge Gibbons and Judge Hutchinson voting to grant rehearing.

STATEMENT OF FACTS

In 1979, AIP began operations as a retail broker-dealer of corporate and municipal securities. Bruno, Mendicino and Charles Krzywicki, AIP's secretary-treasurer and financial and operations principal, each owned one-third of AIP's stock.

A. Currency Transaction Reporting Violations

AIP's records established that, during the period from January 1, 1980 through May 13, 1983, the firm received currency from its customers as follows:

Year	Amount of Currency Received
1980	$ 352,412.20
1981	285,882.25
1982	1,466,379.14
1983	101,908.70
TOTAL	$2,206,582.29

During that period, AIP received currency, not necessarily in reportable amounts, from 66 of its approximately 4,600 customers.

The currency received from Petitioners' customers was:

	Bruno		Mendicino	
Year	Amount	Transactions Over $10,000	Amount	Transactions Over $10,000
1980	$ 10,000.00	0	$ 6,709.69	0
1981	35,145.00	2	71,538.33	4
1982	192,000.00	3	143,686.63	7
1983	—	0	6,479.55	0
TOTALS	$237,145.00	5	$228,414.20	11

AIP, throughout its existence, never filed a CTR.

From January 1, 1980 through May 13, 1983, AIP maintained two checking accounts with PNB. During that period, AIP deposited approximately $2,700,000 in currency, about 3-1/2% of its total deposits.

From July 23, 1980 through May 6, 1983, AIP deposited more than $10,000 in currency on 106 days. During that period, AIP never made a single currency deposit over $10,000. On many occasions, consecutive deposits, either into the same or different accounts, exceeded $10,000. On those 106 days, AIP made between two and nine currency deposits. On most of the 106 days, AIP made its currency deposits at only one PNB branch office. PNB filed 32 CTRs relating to AIP's currency deposits during the period. Further details of AIP's banking activities, as related to the indictment, are set forth in Appendix I of the Third Circuit's opinion.

B. Affidavit, Warrant and Search

The Warrant was issued on the basis of an affidavit by Special Agent C. Robert Tate of IRS. The affidavit clearly established probable cause that AIP received large amounts of currency from its customers and did not file CTRs. The affidavit also demonstrated that AIP deposited that currency in such a manner that PNB would not file CTRs. However, as the district court held, the affidavit did not make a "showing that the scheme to evade filing of currency transaction reports was so extensive that it could be reasonably inferred that all the brokerage records were likely to constitute evidence of the crime under investigation. The suspected criminal activity went to only one aspect of the business . . . "

The Warrant was prepared by IRS agents, with assistance from the SEC. Essentially, the Warrant contained a list of every type of record the SEC required broker-dealers to maintain. IRS added other general categories of documents to the list prepared by the SEC. IRS also added to the list of documents ordered to be seized:

> [o]ther documents and items which are fruits, instrumentalities and/or evidence of violations of Title 31, United States Code, Section 5313 *and* Title 18, United States Code, Sections 2 and 371.

(Emphasis in original.) No category of documents in the Warrant was restricted to documents that involved either currency transactions, or AIP's customers who participated in currency transactions.

37 government officials, 34 from IRS and three from the SEC, raided AIP's office at 2:45 p.m. on Friday, May 13, 1983. The executing agents planned to seize all documents within the 19 general categories in the Warrant. It also was decided to seize everything else that was considered evidence of currency reporting violations and of conspiracies, either within AIP or with its customers, to conceal reporting violations or to prevent PNB from filing CTRs. The agents further operated under the belief that the Warrant justified the seizure of all documents that conceivably might contain evidence of any violation of any federal law, without regard to whether or not the agents possessed knowledge that the documents actually contained evidence of a crime.

Eventually, the executing agents abandoned all pretext of confining the search either to the objects of the Warrant or to evidence of criminal conduct. The district court found that the Warrant's execution "was marred

with misjudgment, carelessness and haste." The court of appeals described the search as "far less than a model of constitutional decorum . . . " The result was that, of the 149,000 documents seized, 46,000 documents were neither described in any of the broad, general categories of the Warrant, nor constituted evidence of any criminal conduct.

ARGUMENT

I.

AN INDIVIDUAL MAY NOT BE CONVICTED OF "CAUSING", WITHIN THE MEANING OF 18 U.S.C. § 2(b), A FINANCIAL INSTITUTION NOT TO FILE CURRENCY TRANSACTION REPORTS, AS REQUIRED BY 31 U.S.C. § 5313(a) (1982) AND 31 C.F.R. § 103.22(a) (1986), FOR MAKING MULTIPLE CURRENCY DEPOSITS, EACH UNDER $10,000 BUT AGGREGATING MORE THAN $10,000, IN ONE DAY AT ONE BANK, BECAUSE THE EVENT THAT WOULD HAVE TRIGGERED A FILING OBLIGATION FOR THE BANK, A SINGLE PHYSICAL TRANSFER OF MORE THAN $10,000 IN CURRENCY, NEVER OCCURRED.

Petitioners do not dispute the court of appeals' conclusion that, under 18 U.S.C. § 2(b), criminal liability may be imposed upon them if their actions caused PNB not to report currency transactions in situations in which the Reporting Act, 31 U.S.C. §§ 5311-5322 (1982), prior to its amendment in 1986 (the addition of 31 U.S.C. § 5324), and the regulations promulgated thereunder, 31 C.F.R. Part 103 (1986), required reports to be filed. Accordingly, the relevant inquiry is whether the Reporting Act and regulations required institutions to report multiple currency

transactions, each under $10,000 but aggregating more than $10,000, in one day by one customer.

The Reporting Act does not answer the question. Section 5313(a) merely authorized the Secretary of the Treasury to prescribe regulations requiring the reporting of currency transactions.

The regulations in effect during the period relevant to this case did not require a financial institution to report multiple currency transactions under $10,000 by one customer in one day that totaled over $10,000. 31 C.F.R. § 103.22(a) provided: "Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000." The term "transaction in currency" was defined in 31 C.F.R. § 103.11: "A transaction involving the physical transfer of currency from one person to another." Therefore, under the clear language of the regulations, a CTR was not required to be filed for any transaction not involving the physical transfer of more than $10,000 in currency. *See, e.g., United States v. Risk*, 843 F.2d 1059, 1062 (7th Cir. 1988); *United States v. Hayes*, 827 F.2d 469, 472 (9th Cir. 1987); *United States v. Bank of New England, N.A.*, 821 F.2d 844, 849-50 (1st Cir.), *cert. denied*, 108 S. Ct. 328 (1987).

During the period relevant to this petition, the only assertion by the Treasury Department of a duty on the part of a financial institution to file a CTR with respect to multiple currency transactions under $10,000 but totaling more than $10,000 was in the instructions on the 1980 revision of the CTR form, Form 4789, U.S. Treasury

Department, Internal Revenue Service, which claimed: "Multiple transactions by or for any person which in any one day total more than $10,000 should be treated as a single transaction, if the financial institution is aware of them." However, the Third Circuit in this case acknowledged:

> Since utilization of this definition could be construed to impose new duties on financial institutions, courts have refused to treat the form as an agency rulemaking establishing a basis for liability because the form was not promulgated in accordance with the safeguards provided by the Administrative Procedure Act, 5 U.S.C. §§ 553(b); 551(4). *See United States v. Reinis*, 794 F.2d 506 (9th Cir. 1986); *United States v. Shearson Lehman Bros., Inc.*, 650 F. Supp. 490 (E.D. Pa. 1986).

United States v. American Investors of Pittsburgh, Inc., 879 F.2d 1087, 1091 n.4; *see also United States v. Gimbel*, 830 F.2d 621, 626 (7th Cir. 1987); *United States v. Anzalone*, 766 F.2d 676, 679 n.6 (1st Cir. 1985).

In this regard, in his statement on April 16, 1986, Richard C. Wassenaar, Assistant Commissioner (Criminal Investigation) of IRS specifically stated:

> The second aspect of the regulations causing prosecution difficulties is the lack of any requirement that multiple currency transactions on the same day (each less than $10,000) that *aggregate* more than $10,000, be reported by a financial institution. Although the CTR Form 4789 requires aggregation of multiple transactions at the same financial institution on the same day, some courts have refused to enforce such language on the grounds that the form

alone does not provide constitutionally sufficient notice.

Tax Evasion, Drug Trafficking and Money Laundering as They Involve Financial Institutions: Hearings Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs, 99th Cong., 2d Sess. 181 (1986) (emphasis in original). Moreover, the First Circuit has observed that the Comptroller General of the United States, in a report to Congress entitled "Bank Secrecy Act Reporting Requirements Have Not Yet Met Expectations, Suggesting Need for Amendment", GED-81-80, dated July 23, 1981, stated that the regulations under the Reporting Act were silent on the subject of a financial institution's customer making multiple transactions to avoid the filing of CTRs, that the Treasury Department, although aware of deficiencies in the regulations in 1975, did not publish proposed revisions until 1979 and did not promulgate revised regulations until July 7, 1980, and that the 1980 revised regulations still did not address the multiple transactions deficiency. *Anzalone*, 766 F.2d at 681-82.

It is submitted that the only support for the Third Circuit's conclusion that, prior to 1986, the Reporting Act and regulations required CTRs to be filed for structured transactions under $10,000 on one day by one customer that aggregated over $10,000 is case law interpreting the statute and regulations. And the Third Circuit's analysis of that case law obscured the fact that Petitioners' conduct would have been deemed lawful in the First, Seventh, Eighth and Ninth Circuits, and illegal only in the Second, Eleventh and (now) Third Circuits.

The Seventh Circuit's resolution of the issue involved in this case is firmly rooted in logic and the plain meaning of the statute and regulations. *Gimbel* involved an attorney who was convicted, *inter alia*, under 18 U.S.C. §§ 1001 and 2(b) for structuring currency in excess of $10,000 into deposits less than $10,000 at a single bank branch office on 12 separate days. The Seventh Circuit reversed the conviction, holding that "[t]he essential characteristic of a structured transaction is that the customer effects several discrete 'physical transfer(s) of currency,' [*United States v. Larson*, 796 F.2d 244, 245 (8th Cir. 1986)]." The Seventh Circuit refused to accept the government's argument that the CTR form's instructions could impose a duty upon financial institutions to aggregate separate currency transactions in order to bring those transactions within the ambit of the Reporting Act and regulations. 830 F.2d at 626.

The Seventh Circuit recently strongly reaffirmed the holding of *Gimbel* in *Risk*. In that latter case, an undercover government agent, after speaking with Risk, a bank branch manager, exchanged a check in the amount of $58,000 for $9,000 in currency and five cashier's checks of $9,800 each. The agent then cashed the checks the same day at five different branches of Risk's bank. Similar events occurred on another day. The court rejected the government's effort to distinguish *Gimbel* on the ground that Risk was an employee of the bank:

> The government, however, misconstrues *Gimbel*. Our finding that the bank had no legal duty to report structured transactions did not rest on the identity of the defendant, but rather on the

> lack of statutory authority for finding a violation of the CTR statute for *any* structured transactions that do not exceed $10,000. Nothing in *Gimbel* suggests that the CTR statute treats bankers and customers differently; the law does not proscribe structured transactions not exceeding $10,000, regardless of who does it. Risk, therefore, could not have violated his duty to report if no violation occurred. Since banks or customers need not report structured transactions not exceeding $10,000, Risk did not violate the law.

843 F.2d at 1062 (emphasis in original).

The approaches of the First and Eighth Circuits to this issue rely upon the due process clause. In *Anzalone*, a bank customer engaged in structured purchases from one bank of cashier's checks aggregating more than $10,000 both on the same and separate days. Finding that the statute and regulations imposed no duty on a customer to inform a bank of the structured nature of his currency transactions, the First Circuit reversed Anzalone's conviction under 31 U.S.C. § 5313 and 18 U.S.C. § 2 on the ground that "[t]he application of criminal sanctions to appellant for engaging in the activity heretofore described violates the fair warning requirements of the due process clause of the fifth amendment." 766 F.2d at 682. While the opinion did not otherwise distinguish the same day structured transactions from the separate day transactions, the court did observe that the "one day, one customer" instruction for Form 4789 "is not a part of the Code of Federal Regulations and is thus not binding on financial institutions . . . " *Id.* at 679 n.6. Judge Aldrich, concurring, apparently would have reached a different

result with respect to the same day structured transactions, on the basis of his belief that the CTR form's instructions were valid. *Id.* at 684.

In *Bank of New England*, a customer, on 31 occasions, presented multiple checks under $10,000 to a teller and received lump sums of currency over $10,000. The First Circuit did not apply *Anzalone* because the bank, on numerous occasions, physically transferred currency exceeding $10,000, which the plain language of the regulations required to be reported. 821 F.2d at 849-50. While the court seemingly went out of its way to assert that *Anzalone* did not decide whether structured transactions by one customer on one day at different branches of one bank are reportable, the court also pointed out that it was not deciding that issue. *Id.* at 851.

Larson was a prosecution of a bank customer under 18 U.S.C. § 1001 for multiple transactions less than $10,000 that totaled more than $10,000 on one day at one bank. The Eighth Circuit, without analysis of the specifics of the transactions, held that, because the Reporting Act and regulations imposed a duty on a bank customer neither to file CTRs nor to disclose his conduct to the bank, the fair warning requirement of the due process clause prohibited the imposition of any criminal liability. 796 F.2d at 246-47.

United States v. Polychron, 841 F.2d 833 (8th Cir.), *cert. denied*, 109 S. Ct. 135 (1988), was an appeal from the dismissal of an indictment charging a bank president with violating 31 U.S.C. § 5313 and 18 U.S.C. § 2, 18 U.S.C. §§ 1001 and 2, and 18 U.S.C. § 371, because the bank did not file CTRs for two days, on each of which

Polychron made separate currency withdrawals under $10,000 but aggregating over $10,000 from a customer's account. The opinion does not state whether, on those two days, Polychron made a single transfer of currency to the bank customer. Again without analyzing the details of the currency transfers, the Eighth Circuit held that the Reporting Act provided constitutionally adequate warning that same day currency transactions structured by a bank, or its officers and employees, were reportable, and that the bank, its officers and employees could be criminally responsible for failures to file CTRs. 841 F.2d at 837. The Eighth Circuit deemed the crucial distinction for due process purposes to be "between a customer structuring transactions without the bank's knowledge and the bank itself structuring the currency transactions." *Id.* at 836. *Accord, Pilla v. United States*, 861 F.2d 1078 (8th Cir. 1988). *Polychron* and *Pilla* do not disturb the Eighth Circuit rule that a customer of a financial institution cannot violate any criminal statute by structuring currency transactions, but a financial institution, its officers and employees can. In this case, it is undisputed that AIP and its officers were customers of PNB with respect to counts 48 through 94 of the indictment.

The Ninth Circuit has reached the same result by combining the reasoning of the First, Seventh and Eighth Circuits. *United States v. Varbel*, 780 F.2d 758 (9th Cir. 1986), involved currency purchases of six cashier's checks from six different banks on three days. 780 F.2d at 759. The court held that the plain meaning of the Reporting Act and regulations did not require CTRs to be filed for currency transactions under $10,000. *Id.* at 761-62. The court went further and opined that the imposition of

criminal sanctions would violate due process. *Id.* at 762. The court did not mention the CTR form's instructions because the case did not involve transactions on one day at one bank.

In *Reinis*, cashier's checks in amounts under $10,000 but totaling more than $10,000 were purchased from different branches of one bank on ten days. The Ninth Circuit did not accept the government's argument that the instructions for Form 4789 rendered those transactions reportable, and reversed Reinis' convictions, primarily on the authority of *Varbel*.

In *Hayes*, cited by the Third Circuit as an example of the reevaluation of the Reporting Act and regulations, a bank customer delivered $113,000 in currency in a bag to a bank vice-president. 827 F.2d at 470. The Ninth Circuit found "no need to 'aggregate' to consider this exchange as a single transaction in excess of $10,000," which should have been reported. *Id.* at 472. The court specifically noted that the case did not implicate the purported rulemaking of the instructions for Form 4789. *Id.* n.4. Accordingly, there is no basis for concluding that the Ninth Circuit reconsidered its holdings that multiple currency transactions under $10,000 which cumulate over $10,000 in one day by one customer with one bank were not reportable.

The relevant Second Circuit cases are *United States v. Heyman*, 794 F.2d 788 (2d Cir.), *cert. denied*, 479 U.S. 989 (1986) and *United States v. Nersesian*, 824 F.2d 1294 (2d Cir.), *cert. denied*, 108 S. Ct. 357 (1987). In *Heyman*, the Second Circuit unquestioningly accepted the validity of the CTR form's instructions and, in *dictum*, stated that

Merrill, Lynch, Pierce, Fenner & Smith, Inc. would have been required to report same day transactions by one customer cumulating more than $10,000. 794 F.2d at 789 n.2, 792. In *Nersesian*, a heroin importation conspiracy case, the Second Circuit, without further analysis of the Reporting Act, its regulations, or the Form 4789 instructions, applied the *dictum* from *Heyman* to affirm the conviction of a bank customer who structured the purchase of $11,000 worth of money orders for currency into 11 separate transactions in one day at one bank. 824 F.2d at 1311-12.

The significant Eleventh Circuit cases are *United States v. Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983), and *United States v. Giancola*, 783 F.2d 1549 (11th Cir.), *cert. denied*, 479 U.S. 1018 (1986). In *Tobon-Builes*, the defendant and a confederate, in one day, purchased two cashier's checks, each for less than $10,000 but totaling $18,000, from 10 different banks. Finding that the defendant and his confederate were one "person" within the meaning of the Reporting Act, and, without discussion, relying upon the instructions on the CTR form, the Eleventh Circuit affirmed Tobon-Builes' convictions under 18 U.S.C. §§ 1001 and 2(b). 706 F.2d at 1097-98.

Giancola presented the issue of a bank customer who structured currency transactions under $10,000 but aggregating over $10,000 in one day at different branches of one bank. The court, without mentioning the "one day, one customer" instruction and relying on *Tobon-Builes*, held that different branches of one bank are one "financial institution" within the meaning of the Reporting Act and regulations and affirmed the convictions under 18 U.S.C. § 371. In dissent, Judge Hill wrote:

> *Tobon-Builes* thus constitutes a narrow holding and ought not to be extended to cover separate transactions which were deliberately not covered by the Treasury regulations merely because the separate transactions probably accomplished something contrary to wishes of the Secretary, no matter how beneficial to the country it would be if those wishes were abided.

783 F.2d at 1554.

Summarizing, on the facts of this case, the First, Seventh, Eighth and Ninth Circuits would have reached a result contrary to that of the Third Circuit. Those courts would have relied upon either the plain meaning of the Reporting Act and its regulations, or the due process clause and the failures of Congress and the Treasury Department to have provided constitutionally adequate notice that a customer of a financial institution committed a crime by structuring currency transactions to avoid the Reporting Act's filing requirements. Apparently, the Second and Eleventh Circuits would have agreed with the Third, but none of those courts has ever explained how, before 1986, the language of the Reporting Act and its regulations proscribed structured transactions.

If this Court would agree that the convictions on the structured deposit counts are invalid, Petitioners' convictions on all remaining counts of the indictment would have to be vacated and their case remanded to the district court for a new trial on those counts. With respect to the conspiracy charge in count 1 of the indictment, the district court instructed the jury that Petitioners could be found guilty if the object of the conspiracy were either that AIP would not file CTRs, or to induce PNB not to file CTRs. Therefore, the conspiracy count was submitted to

the jury on alternative theories, and the jury's general verdicts of guilty on count 1 rendered it impossible to determine the basis of its decision. The verdicts could have been based on a finding that Petitioners conspired only to cause PNB not to file CTRs.

Similarly, the district court instructed the jury that it could find Petitioners guilty on counts 2 through 47 of the indictment either as aiders and abetters under 18 U.S.C. § 2(a), or, under *Pinkerton v. United States*, 328 U.S. 640 (1946), as a member of the conspiracy charged in count 1, if another member of the conspiracy committed the crimes charged in counts 2 through 47. The jury could have determined that AIP committed the crimes charged in those counts, and that Petitioners were guilty of those crimes only because Petitioners conspired with AIP to cause PNB not to file CTRs by structuring currency deposits.

When a case is submitted to a jury on alternative theories, and one of the theories is premised upon an unconstitutional or improper interpretation of a statute, a new trial in required. *See, e.g., United States v. Kozminski*, 108 S. Ct. 2751, 2765 (1988); *Sandstrom v. Montana*, 442 U.S. 510, 526 (1979); *Leary v. United States*, 395 U.S. 6, 31-32 (1969); *Yates v. United States*, 354 U.S. 298, 312 (1957); *Stromberg v. California*, 283 U.S. 359 (1931).

II.

ALL RECORDS SEIZED FROM AIP'S OFFICE SHOULD HAVE BEEN SUPPRESSED BECAUSE THE WARRANT AUTHORIZED, AND THE AGENTS CONDUCTED, A GENERAL SEARCH, AND BECAUSE THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE IS INAPPLICABLE WHEN A WARRANT IS OBVIOUSLY INVALID AND THE EXECUTING OFFICERS FLAGRANTLY EXCEED ITS SCOPE.

The fourth amendment prohibits general, exploratory searches. *See Maryland v. Garrison*, 480 U.S. 79, 84 (1987); *Andresen v. Maryland*, 427 U.S. 463, 480 (1976). A general warrant authorizes "a general exploratory rummaging in a person's belongings." *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). And even a valid warrant may be an instrument of oppression if unconstitutionally used as an admission ticket " . . . to launch forth upon unconfined searches and indiscriminate seizures as if armed with all the unbridled and illegal power of a general warrant." *Stanley v. Georgia*, 394 U.S. 557, 572 (1969) (Stewart, J., concurring).

First, all 19 categories of the Warrant were overbroad. The affidavit wholly failed to establish any nexus between most of the categories of records and the crimes under investigation. *See Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 306-07 (1967). In the few categories where such a connection was demonstrated, the Warrant still went too far because it commanded the seizure of documents unrelated to currency transactions and the customers of AIP who engaged in them.

The Warrant also directed the seizure of: "[o]ther documents and items which are fruits, instrumentalities

and/or evidence of violations of Title 31, United States Code, Section 5313 *and* Title 18, United States Code, Sections 2 and 371." (Emphasis in original.) IRS Special Agents Tate and Sherlock, the planners and leaders of the AIP raid, testified that they interpreted the Warrant to allow the seizure of any document that, upon later perusal at their leisure, might conceivably constitute evidence of a violation of any federal statute.

In contrast to the Third Circuit in this case, the First, Eighth, Ninth and Tenth Circuits have held that a warrant that "confines" a search only with reference to a broad federal statute is insufficiently particular to satisfy the fourth amendment. *See, e.g., United States v. Leary*, 846 F.2d 592, 601-02 (10th Cir. 1988) (22 U.S.C. § 2778, 50 U.S.C. app. § 2410); *Rickert v. Sweeney*, 813 F.2d 907, 909 (8th Cir. 1987) (18 U.S.C. § 371, 26 U.S.C. §§ 7201, 7206(2)); *United States v. Spilotro*, 800 F.2d 959, 964-65 (9th Cir. 1986) (Kennedy, C.J.) (18 U.S.C. §§ 371, 892-894, 1084, 1503, 1511, 1952, 1955, 1962, 1963, 2314, 2315); *United States v. Cardwell*, 680 F.2d 75, 77 (9th Cir. 1982) (26 U.S.C. § 7201); *In re Lafayette Academy, Inc.*, 610 F.2d 1, 3 (1st Cir. 1979) (18 U.S.C. §§ 286, 287, 371, 1001, 1014).

Andresen v. Maryland, relied upon by the Third Circuit in this case, does not support that court's conclusion that the Warrant does not offend the particularity clause of the fourth amendment. In that case, this Court held that, when the warrant there at issue was read as a whole, the facially nonparticular "general tail" only referred to a specific crime with respect to one piece of property. 427 U.S. at 480-82. In this case, the entire Warrant is limited neither to currency transactions nor to the customers who engaged in them.

Although armed with a Warrant permitting the seizure of 103,000 documents, of which only approximately 3,000 related to their investigation of currency reporting violations, the agents nevertheless managed to confiscate 46,000 other documents. The Third Circuit was unperturbed by that circumstance, finding it did not rise to an "abusive" level. The Third Circuit's equanimity clearly conflicts with the view of the United States Court of Appeals for the Tenth Circuit which, in *United States v. Medlin*, 842 F.2d 1194, 1198-1200 (10th Cir. 1988), suppressed the entire fruits of a search because of the *ultra vires* seizure of 667 items. *See United States v. Crozier*, 777 F.2d 1376, 1381 (9th Cir. 1985); *United States v. Lambert*, 771 F.2d 83, 93-94 (6th Cir.), *cert. denied*, 474 U.S. 1034 (1985); *Marvin v. United States*, 732 F.2d 669, 674-75 (8th Cir. 1984); *United States v. Wuagneux*, 683 F.2d 1343, 1354 (11th Cir. 1982); *United States v. Heldt*, 668 F.2d 1238, 1259 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 926 (1982); *see also Waller v. Georgia*, 467 U.S. 39, 44 n.3 (1984); *Terry v. Ohio*, 392 U.S. 1, 17-19 (1968).

In assessing whether warrants were flagrantly disregarded, courts of appeals have considered whether the executing officers exploited the warrants to launch fishing expeditions for evidence of crimes unrelated to the ostensible subjects of their investigations. *See United States v. Medlin*, 842 F.2d at 1199; *Marvin v. United States*, 732 F.2d at 675; *United States v. Tamura*, 694 F.2d 591, 597 (9th Cir. 1982); *United States v. Rettig*, 589 F.2d 418, 423 (9th Cir. 1978). In this case, IRS agents admitted that they seized records that they hoped would constitute evidence of income tax or stolen securities violations by AIP's

principals, neither of which was mentioned in the affidavit supporting the issuance of the Warrant, and neither of which was found.

If this Court concurs in Petitioners' arguments that the Warrant was overbroad and nonspecific in its entirety because it mandated the seizure of 100,000 records unrelated to reportable currency transactions, it is clear that the good faith exception of *United States v. Leon*, 468 U.S. 897 (1984) would be inapplicable. First, *Leon's* standard for objective good faith "requires officers to have a reasonable knowledge of what the law prohibits." *Id.* at 920 n.20, 923 n.24. In this case, reasonably legally astute federal officers should have realized that the law does not sanction wholesale seizures of records that are irrelevant to the crimes under investigation or their perpetrators. *See United States v. Leary*, 846 F.2d at 609; *United States v. Fuccillo*, 808 F.2d 173, 178 (1st Cir. 1987); *United States v. Spilotro*, 800 F.2d at 968; *United States v. Crozier*, 777 F.2d at 1379, 1381. The question of what a reasonable officer might believe as to the law of search and seizure arose in a different context in *Creamer v. Porter*, 754 F.2d 1311, 1319 (5th Cir. 1985), where the court wrote:

> The officers testified that it was their understanding of the law that if they were validly on the premises, they could seize anything. . . . We agree with the district court that this gross misstatement and simplification of the law of search and seizure cannot possibly represent a reasonable police officer's understanding of search and seizure law.
>
> . . . [W]e cannot accept under an objective test that any police officer's reasonable understanding of the law would be that any item located anywhere on the premises was fair game . . .

Second, the good faith exception is inapplicable to this case because the agents exceeded the scope of the Warrant. In *Leon*, 468 U.S. at 918 n.19, this Court stated:

> Our discussion of the deterrent effect of excluding evidence obtained in reasonable reliance on a subsequently invalidated warrant assumes, of course, that the officers properly executed the warrant and searched only . . . for those objects that it was reasonable to believe were covered by the warrant.

In the situation in which 46,000 documents outside the Warrant were seized, the good faith exception is unavailable to the government. *See United States v. Leary*, 846 F.2d at 594-95, 609-10; *United States v. Fuccillo*, 808 F.2d at 177-78; *United States v. Strand*, 761 F.2d 449, 456-57 (8th Cir. 1985).

Similarly, if this Court agrees with Petitioners' contention that, regardless of the nature of the Warrant, the agents conducted an impermissible general search, the entire fruits of the constitutional violation must be suppressed. *See United States v. Medlin*, 842 F.2d at 1198-1200; *United States v. Crozier*, 777 F.2d at 1381; *Marvin v. United States*, 732 F.2d 674-75; *United States v. Tamura*, 694 F.2d at 597; *United States v. Wuagneux*, 683 F.2d at 1354; *United States v. Heldt*, 668 F.2d at 1259; *United States v. Rettig*, 589 F.2d at 423.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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October 10, 1989

APPENDIX

APPENDIX
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Filed: June 29, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-3169/70/71,
88-3231 and 88-3232

THE UNITED STATES
vs.
AMERICAN INVESTORS OF PITTSBURGH, INC.
JOHN J. BRUNO
JOHN W. MENDICINO
CHARLES KRZYWICKI
ALAN ZYTNICK
LOUIS J. PECORI

JOHN J. BRUNO,

Appellant in No. 88-3169

(D.C. Crim. No. 87-96-2)

THE UNITED STATES
vs.
AMERICAN INVESTORS OF PITTSBURGH, INC.
JOHN J. BRUNO
JOHN W. MENDICINO
CHARLES KRZYWICKI
ALAN ZYTNICK
LOUIS J. PECORI

JOHN W. MENDICINO,

Appellant in No. 88-3170

(D.C. Crim. No. 87-96-3)

THE UNITED STATES
vs.
AMERICAN INVESTORS OF PITTSBURGH, INC.
JOHN J. BRUNO
JOHN W. MENDICINO
CHARLES KRZYWICKI
ALAN ZYTNICK
LOUIS J. PECORI

ALAN ZYTNICK,

Appellant in No. 88-3171

(D.C. Crim. No. 87-96-5)

THE UNITED STATES
vs.
AMERICAN INVESTORS OF PITTSBURGH, INC.
JOHN J. BRUNO
JOHN W. MENDICINO
CHARLES KRZYWICKI
ALAN ZYTNICK
LOUIS J. PECORI

AMERICAN INVESTORS OF PITTSBURGH, INC.

Appellant in No. 88-3231

(D.C. Crim. No. 87-96-1)

THE UNITED STATES
vs.
AMERICAN INVESTORS OF PITTSBURGH, INC.
JOHN J. BRUNO
JOHN W. MENDICINO
CHARLES KRZYWICKI
ALAN ZYTNICK
LOUIS J. PECORI

CHARLES KRZYWICKI,

Appellant in No. 88-3232

(D.C. Crim. No. 87-96-4)

Appeal from the United States District Court
for the Western District of Pennsylvania

Argued
December 1, 1988
Before: HIGGINBOTHAM, MANSMANN, and
GARTH, *Circuit Judges*

(Filed June 29, 1989)

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OPINION OF THE COURT

MANSMANN, *Circuit Judge.*

We today grapple with the extent of criminal liability imposed by the Currency Transactions Reporting Act, 31 U.S.C. §§ 5313(a); 5322 (*as amended* 1982), and its attendant regulations, prior to their 1986 amendment. Specifically, we must decide whether *customers* of a financial institution, participating in both a sophisticated and simplistic money-laundering scheme, can violate the Act.

A corporation, American Investors of Pittsburgh, Inc., three of its principals, John J. Bruno, President, John Mendicino, Executive Vice-President, Charles Krzywicki, Secretary-Treasurer, and a corporate customer, Alan Zytnick, seek vacation of convictions resulting from charges that they conspired to and defrauded the United States by obstructing the lawful function of the Internal Revenue Service in collecting information about certain currency transactions involving amounts greater than $10,000. The defendants[1] were charged with various offenses concerning their failure to file Currency Transaction Reports ("CTRs"), required when cash transactions exceed $10,000, and causing another financial institution, Pittsburgh National Bank, to fail to file CTRs, as part of a

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[1] Unless otherwise noted, the defendants, Bruno, Mendicino, Krzywicki and American Investors of Pittsburgh, will be referred to collectively as "American Investors."

pattern of illegal activity involving more than $100,000 in a twelve month period contrary to provisions of the Reporting Act,[2] and the pertinent regulations[3] and in violation of 18 U.S.C. §§ 2, 371 and 1001.

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[2] The relevant provisions of Title 31 are as follows:

§ 5313. Reports on domestic coins and currency transactions

(a) When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

§ 5322. Criminal penalties

(b) A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315), while violating another law of the United States or as part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned for not more than 5 years, or both.

[3] The regulation in effect at the time of the charged violations requiring the filing of reports for currency transactions read:

(Continued on following page)

Recently, in *United States v. Mastronardo*, 849 F.2d 799 (3d Cir. 1988), *reh'g denied*, we held that the Currency Transactions Reporting Act did not give customers of financial institutions fair notice that "structuring" cash transactions to avoid the reporting requirements constituted criminal activity. Not addressed in *Mastronardo*, but requiring resolution today, is whether structuring of transactions with the intent to avoid the financial institution's duty to file CTRs regarding the transaction in and of itself is forbidden by the Act. In a footnote in *Mastronardo*, we recognized that, when other courts had been confronted with the subissue of the statutory reporting duty of financial institutions, they considered the specifics of the transactions. We found it unnecessary to analyze the particular financial practices of the *Mastronardo* defendants because their convictions, solely as customers of a financial institution, clearly violated due process. *Id.* at 803 n.9. Because here, however, American Investors was also convicted under 18 U.S.C. § 2(b) of willfully causing a financial institution to fail in its statutory duty, the *Mastronardo* decision does not have a preclusive effect. We conclude that given the factual specifics, the particular structuring activity involved here was prohibited by the statute, the regulations and the

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§ 103.22 Reports of currency transactions.

(a)(1) Each Financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000. . . .

31 C.F.R. § 103.22(a)(1) (1982).

case law interpreting them. Therefore, although *Mastronardo* would have appeared to compel vacation of the convictions of American Investors relating to its customer-based activity in causing Pittsburgh National Bank to violate the currency reporting laws (Counts 48 through 94), the presence of tandem 18 U.S.C. § 2(b) "willfully causing" convictions, which impute the necessary intent of actors otherwise lacking legal capacity to commit a crime to an innocent intermediary, requires a different result. We find that American Investors here supplied the necessary willfulness element of 31 U.S.C. § 5322 to the entity with the legal capacity to commit the crime, Pittsburgh National Bank, and with one exception, we will affirm the judgments of conviction on these counts. Since the arguments championing vacation of the remaining counts had as their premise an overturning of the Pittsburgh National Bank counts, the conspiracy convictions and the substantive convictions relating to American Investors' own failure to file CTRs will likewise stand.

We also conclude that the evidence supports the verdicts of guilty on both the conspiracy count and the aiding and abetting the money-laundering scheme count against Alan Zytnick, the customer of American Investors.

Finally, we decide that the search of American Investors' office and storage area and the seizure of a large amount of its corporate documents were not unconstitutional and evidence so secured was properly admitted at trial.

I.

A.

American Investors of Pittsburgh, located in Pittsburgh, Pennsylvania, is a broker and dealer of securities, registered with the Securities and Exchange Commission and a member of the National Association of Securities Dealers, a self-regulatory, non-governmental body which oversees the over-the-counter stock market. Under the Reporting Act's regulations, one if a broker/dealer's legal obligations requires filing a CTR with the Internal Revenue Service when transactions in currency in excess of $10,000 occur. 31 U.S.C. § 5313(a) *et seq.*; 31 C.F.R. § 103.22(a). A transaction in currency is defined simply as: "[a] transaction involving the physical transfer of currency from one person to another." 31 C.F.R. § 103.11(o). The form provided for reporting currency transactions, Treasury Form 4789, requests the identity of the individual providing the funds, and, if that individual is not the owner of the funds, the owner of the funds.[4] An additional requirement is that the institution file the report within fifteen days following the day of the transaction. 31 C.F.R. § 103.25(a).

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[4] A number of cases have discussed the legal effect of the language of Form 4789. The cause for controversy is that the form provides an interpretation of activity deemed to constitute a single transaction for reporting purposes, a delineation otherwise lacking in the statute and regulations. Form 4789 states that: "[m]ultiple transactions by or for any person which in any one day total more than $10,000 should be treated as a single transaction, if the financial institution is aware of them." U.S. Dept. of Treasury Form 4789 (1982). Since utilization of this definition could be construed to impose new duties on

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American Investors never filed a required CTR in any instance of receipt of cash in excess of $10,000, although, during the time period charged in the indictment, such occasions were well-documented. The allegations of the indictment portrayed a scheme by which American Investors devised various recordkeeping manipulations to disguise the receipt of cash from customers, including, but not limited to, Alan Zytnick. The practice of American Investors' Secretary-Treasurer, Charles Krzywicki, allegedly included utilizing dead or inactive accounts to distort the recording of purchases of municipal bonds and securities by cash customers.[5] Another broker testified that in order to cover up the fact that cash received from certain customers had been placed in an unauthorized account, he would remove the part of the receipt indicating that the transaction had been so processed before sending it to the customer. He would then destroy the monthly statement for the improperly utilized account.

(Continued from previous page)

financial institutions, courts have refused to treat the form as an agency rulemaking establishing a basis for liability because the form was not promulgated in accordance with the safeguards provided by the administrative Procedure Act, 5 U.S.C. §§ 553(b); 551(4). *See* United States v. Reinis, 794 F.2d 506 (9th Cir. 1986); United States v. Shearson Lehman Bros., Inc., 650 F. Supp. 490 (E.D. Pa. 1986).

[5] For a specific delineation of the Krzywicki-Zytnick transactions, *see* Appendix II. Both Appendix I, which sets forth in detail American Investors' banking activity at Pittsburgh National Bank and Appendix II were compiled from the indictments which were issued in this case. Our review of the record verifies that the allegations of the indictment utilized in the appendices were satisfactorily proven at trial.

Other concealment techniques, ones utilized by President John Bruno and Executive Vice-President John Mendicino, included altering the data both in American Investors' internal records and on the customers' monthly statements to reflect that cash purchases in excess of $10,000 occurring on one day were inaccurately portrayed as having transpired over a number of days and in amounts of less than $10,000.

The practice to obscure the receipt of currency involved other aspects of the bookkeeping of American Investors. In recording the receipt of cash from some customers, the word "payment" would sometimes be substituted for the word "cash" on its ledgers. Since there was no corresponding field code for the word "payment" when entries were made on American Investors' computers for these cash transactions, these purchases were listed on the computer as having been accomplished by check. On a number of occasions monthly statements sent to customers who had made cash purchases indicated that the customer had paid by check.

The scheme required further refinement since it necessarily entailed the handling of the cash after its receipt from American Investors' customers. American Investors maintained its working and operating accounts at the Seventh Avenue Branch of Pittsburgh National Bank. Sometime after September 1980 the branch manager told Krzywicki that, under new Treasury regulations, the bank, in its capacity as a financial institution, would be obligated to file CTRs whenever American Investors transacted cash business in excess of $10,000. Thereafter, American Investors would pattern its deposits at the bank in order to avoid having single deposits of more

than $10,000. For example, although American Investors would deposit all of its checks the day it received them, it maintained safety deposit boxes at the bank in which it would store some of its currency. American Investors would then stagger individual cash deposits in amounts under $10,000, usually via consecutive transactions, into two separate accounts. These are set forth at length at Appendix I.

In September of 1982, Henry Brown, the new manager of Pittsburgh National Bank's Seventh Avenue Branch, discovered that CTRs were not being filed by the bank with respect to the American Investors' daily currency transactions in excess of $10,000.[6] As a result, a member of Pittsburgh National's staff informed Brenda Perfetti, an employee of American Investors, that the bank would have to file CTRs when daily multiple cash deposits, when aggregated, totalled in excess of $10,000. On October 20, 1982, Mendicino approached Brown and

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[6] On September 16, 1982, Brown was informed by the lead teller of the Seventh Avenue Branch that American Investors was depositing currency of up to $50,000 a day. Discovering that Pittsburgh National was not filing CTRs in regard to these transactions, Brown himself began to prepare CTRs for American Investors' currency deposits. At the same time, Brown decided to seek advice concerning this situation from bank authorities and from a neighbor who worked for the FBI. Brown was then contacted by Special Agent Robert Tate of the Internal Revenue Service who told Brown not to file the CTRs. In a subsequent conversation, this advice was reversed and Brown began filing CTRs, as required, in regard to American Investors' cash deposits.

inquired how they could avoid having the bank file CTRs in regard to American Investors' cash transactions. When Brown told Mendicino that American Investors should be filing CTRs itself, Mendicino replied that the reason American Investors had been making deposits of under $10,000 was to avoid the Treasury's filing requirements. On at least one occasion thereafter. American Investors made multiple currency deposits aggregating over $10,000 into its two accounts at two different Pittsburgh National branches. (Appendix I – No. 14). Prior to September 22, 1982, American Investors had deposited its receipts only at the Seventh Avenue Branch. From November 3, 1982 through May 6, 1983, on twenty-five different days. American Investors continued to make consecutive deposits, each less, but totalling more than $10,000, at the Seventh Avenue Branch. *See* Appendix I.

On May 13, 1983, a warrant was issued authorizing a search of American Investors' offices. Thirty-seven agents from the Internal Revenue Service and the Security and Exchange Commission entered American Investors' office and, over the next ten hours, a search was conducted and employees were interrogated.[7] The warrant authorized the search of twenty-three categories of specifically delineated records and the seizure of other documents and items considered to be fruits, instrumentalities and/or evidence of criminal activity. The breadth of the warrant is an issue raised and discussed later in this decision.

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[7] *See* United States v. American Investors of Pittsburgh, Inc., 672 F.Supp 850 (W.D. Pa. 1987).

Following an investigation, indictments were brought and trial proceeded. The defendants were convicted by the jury and were sentenced on various counts.[8] We have jurisdiction on appeal pursuant to 28 U.S.C. § 1291.

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[8] Specifically, the defendants were convicted as follows: all defendants were found guilty of conspiring to defraud the United States by failing to file CTRs in a pattern of illegal activity involving transactions of more than $100,000 in a twelve month period contrary to 31 U.S.C. §§ 5313, 5322(b), and in violation of 18 U.S.C. § 371 (Count 1). American Investors of Pittsburgh, Bruno, Mendicino and Krzywicki were convicted of failing to file and causing American Investors of Pittsburgh to fail to file CTRs with the Internal Revenue Service (Counts 2 through 47) and of unlawfully causing Pittsburgh National Bank to fail to file CTRs with the Internal Revenue Service (Counts 48 through 94). The Pittsburgh National Bank counts were considered as part of the pattern of illegal activity involving transactions exceeding $100,000 within a twelve month period (May 10, 1982 through May 6, 1983) in violation of 31 U.S.C. §§ 5313 and 5322(b) and 18 U.S.C. § 2. Zytnick, the customer, was convicted as an aider and abettor on Counts 23 through 47 concerning American Investors' failure to file CTRs with the Internal Revenue Service in connection with receipt of currency from him committed as part of a pattern of illegal activity involving transactions exceeding $100,000 within a twelve month period, (May 25, 1982 through April 25, 1983), in violation of 31 U.S.C. §§ 5313, 5322(b) and in violation of 18 U.S.C. § 2. Zytnick was acquitted of Counts 87 through 94, which charged him with in connection with causing Pittsburgh National Bank to fail to file CTRs.

At the close of the government's case, the district court granted the defendants' motion for judgment of acquittal on Counts 95 through 156, which charged them with concealing material facts regarding the receipt of currency from the Securities and Exchange Commission in violation of 18 U.S.C. §§ 1001 and 1002.

Numerous issues have been raised in this appeal, the most compelling of which concerns our recent decision in *United States v. Mastronardo*, 849 F.2d 799 (3d Cir. 1988), interpreting the Currency Transactions Reporting Law 31 U.S.C. § 5313 *et seq*. Because our plenary review on this legal issue of statutory construction affects other questions raised, we discuss it first.

B.

In *Mastronardo*, we held that, prior to its 1986 amendment,[9] the Currency Transactions Reporting Act and its regulations did not impose reporting obligations upon customers of financial institutions. In so deciding we noted a split in the circuits on this issue of customer liability and sided with those courts which decided that imposition of criminal punishment on a customer for structuring transactions violated due process since the Currency Transaction Reporting Act did not give customers fair notice that structuring cash transactions violated the Act. Our rationale was that although the act vested substantial authority in the Treasury Department to require the reporting of currency transactions by both financial institutions and other participants, the Secretary had issued regulations mandating that failure to file a CTR subjected only an offending institution to civil and criminal penalties. A customer's decision to pattern individual transactions to keep each under $10,000 was not criminal activity under the provisions of the Act.

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[9] Congress, as a portion of the Anti-Drug Abuse Act of 1986, Pub.L. No. 99-570, 100 Stat. 3207-22 (amended at 31

(Continued on following page)

In *Mastronardo*, we left open the question of whether the statute outlawed the structuring of transactions by any person, including the financial institution itself, and the extent of an institution's duty to aggregate transactions to determine their reportability.

While American Investors urges vacation of all convictions because of our *Mastronardo* decision, we find the issue to be far more complex. We acknowledge, and the government concedes, that according to *Mastronardo*, American Investors did not have a legal duty to file CTRs in its capacity as a customer of Pittsburgh National

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U.S.C. § 5324 (Supplement 1989)), clarified the status of structuring so that, now, no person may cause or attempt to cause a financial institution to fail to file a currency transaction report.

31 U.S.C. § 5324 reads:

> § 5324. Structuring transactions to evade reporting requirement prohibited
>
> No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction –
>
> (1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a);
>
> (2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) that contains a material omission or misstatement of fact; or
>
> (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

Bank.[10] We must, however, address the government's position that criminal liability may attach to American Investors' actions by virtue of its companion convictions under 18 U.S.C. § 2(b) (1948) (as amended 1951) ("2(b)").

II.

As enacted in 1948, 18 U.S.C. § 2(b) read:

> (b) whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.

The House report explaining this 1948 provision instructed that the purpose of § 2(b) was to permit the deletion from criminal provisions of words such as "causes or procures" and to remove any doubt that the legislature intended that one who causes the commission of an indispensable element of an offense against the United States by an innocent agent or instrumentality be guilty as a principal. H.R. Rep. No. 304, 80th Cong., 1st Sess. 2448-49 (1947). This provision was in accord with Supreme Court decisions in *Rothenberg v. United States*, 245 U.S. 480 (1918) and *United States v. Giles*, 300 U.S. 41 (1937).

To remove any doubt about the scope of the criminal responsibility of one who, although lacking criminal capacity himself, manipulates another to commit a crime, Congress, in 1951, amended 18 U.S.C. § 2(b) to read:

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[10] We recognize that American Investors had a legal duty to file CTRs as a financial institution when it received cash from its customers – a matter not discussed here.

> (b) Whoever willfully causes an act to be done which if directly performed by him or *another* would be an offense against the United States, is punishable as a principal. (Emphasis added).

In the Senate Report accompanying the proposed amendment it was explained that the section:

> [i]ntended to clarify and make certain the intent to punish aiders and abettors regardless of the fact that they may be incapable of committing the specific violation which they are charged to have aided and abetted. . . .

S.Rep. No. 1020, 82nd Cong., 1st Sess. (1951), *reprinted in* 1951 U.S. Code Cong. & Admin. News 2583 (1951).

"Willfully causing" is not an independent crime under 2(b) because the statute in and of itself does not provide a penalty. Instead, 2(b) abolishes the common law distinction between principal and accessory. *Cf. United States v. Standifer*, 610 F.2d 1076 (3d Cir. 1979), *aff'd*, 447 U.S. 10 (1980) (discussing aider and abettor liability under 18 U.S.C. § 2(a)).

Our court has not had a recent opportunity to discuss 2(b) liability, but in *United States v. Catena*, 500 F.2d 1319 (3d Cir.), *cert. denied*, 419 U.S. 1047 (1974), we addressed the issue in connection with a Medicare fraud case. In *Catena*, a physician was convicted of fraudulently submitting Medicare claims through various insurance carries. Under the relevant statute, however, only the insurance company could be charged with the substantive offense of submitting fraudulent claims. As to the physician's liability, we held that under the combination of the substantive offense and of 2(b) the defendant was guilty of

causing an innocent intermediary, the insurance company, to present a false claim to the United States.

A review of decisions construing 2(b) liability from other courts of appeals is instructive. In *United States v. Ruffin*, 613 F.2d 408 (2d Cir. 1979), the Court of Appeals for the Second Circuit held when the "causer", although having no legal capacity, provides the necessary *mens rea* to the innocent intermediary to commit a crime, the causer adopts both the intermediary's act and his capacity. *Id.* at 415. In *United States v. Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983) the court likewise explained that 2(b) is utilized to extend criminal liability to actors lacking legal capacity who cause intermediaries to commit criminal acts where the intermediary, though innocent of the substantive offense, has the capacity to commit that offense. The Court of Appeals for the Eleventh Circuit then cited to *United States v. Lester*, 363 F.2d 68 (6th Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967) for an analysis of principles of criminal law underlying application of 2(b):

> It is but to quote the hornbook law to say that in every crime there must exist a union or joint operation of act, or failure to act, and intend. *However, this is far from suggesting that the essential element of criminal intent must always reside in the person who does the forbidden act. Indeed, the latter may act without any criminal intent whatever, while the mens rea – "willfulness" – may reside in a person wholly incapable of committing the forbidden act.* When such is a case, as at bar, the "joint operation of act and intent" prerequisite to commission of the crime is provided by the person who willfully causes the innocent actor to commit the illegal act. And in such a case, of course, only the person who willfully causes the forbidden act to be done is guilty of the crime.

(Emphasis added.) *Id.* at 73; *see also United States v. Heyman*, 794 F.2d 788 (2d Cir.), *cert. denied*, 479 U.S. 989 (1986) (2(b) holds criminally liable, without regard to guilt or innocence of intermediary, those causing others to commit crimes).

The cases which have addressed the issue of "2(b) or not 2(b)" liability in the context of the Currency Reporting Act raises more questions than they answer. In *Mastronardo*, we did not address the question since there the defendants were acquitted of the 2(b) charges. We did, however, align ourselves with those courts refusing to impose criminal liability on customers charged with both substantive and 2(b) violations. What we must first decide today is whether implicit in our holding of *Mastronardo*, which followed decisions of the First, Seventh, Eighth, and Ninth Circuits, was an adoption of those courts' interpretation of 2(b) liability. Generally, these courts decided that the imposition of criminal liability upon a customer under 2(b) requires knowledge of a crime on the part of the actor with the ability to be charged with the offense (here, Pittsburgh National Bank) before such convictions can stand. Because in *Mastronardo*, the question of criminal liability under 2(b) was not before us on appeal, our holding need not be construed as an embrace of the First, Seventh, Eighth and Ninth Circuits' analysis of customer liability under 2(b). We, thus are free to address the 2(b) issue, in the context of customer liability under the Reporting Act, on the proverbial clean slate. We must then address the other question not reached in *Mastronardo*, what is the scope of a financial institution's obligation to report individual

cash transactions of less than $10,000 which, when aggregated, exceed that amount?

In *Mastronardo*, we relied upon *United States v. Anzalone*, 766 F.2d 676 (1st Cir. 1985), in which the Court of Appeals for the First Circuit struck down the customer's convictions under the Currency Transaction Reporting Act because the statute gave no fair warning to a bank customer that structuring was disallowed. As to *Anzalone's* 2(b) liability, the court found that the bank, under the circumstances of that case, had no knowledge of the structured transactions and thus, did not commit a crime.[11]

In reaching our decision in *Mastronardo*, we also followed *United States v. Larson*, 796 F.2d 244 (8th Cir. 1986). In finding no 2(b) liability, the court in *Larson* likewise focused on the fact that the bank was unaware of the structuring activity.[12]

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[11] In the concurring opinion, Judge Aldrich referred to that particular day in which the defendant purchased three checks at one bank, albeit different branches, and found that, in such an instance, the band had a duty to report the structured transaction. *Anzalone*, 766 F.2d at 684 (Aldrich J. concurring). Since the government did not distinguish this date from the other facts (Anzalone utilizing different banks on different dates) Judge Aldrich found it unnecessary to address whether the same day transactions were reportable.

[12] The Court of Appeals for the Eighth Circuit had a recent opportunity to explain its holding in *Larson* in U.S. v. Polychron, 841 F.2d 833 (8th Cir.), *cert. denied*, 190 S.Ct. 135 (1988), a president of a bank was charged under 2(b) with causing the bank to fail to file CTRs. In imposing liability in *Polychron*, the court distinguished *Larson* because:

(Continued on following page)

The court believed that, for a fact to be material, the entity must have a duty to disclose it and since, under its view of the Act, the bank did not have to report structuring, there was no violation by virtue of the failure to disclose this fact to the government. In a footnote, however, the court assumed without deciding that 2(b) may be used to impose criminal liability on an individual who lacks the capacity to commit the underlying offense. *Id.* at 624, n.2.

In none of these cases did the courts undertake an in depth analysis of 2(b) liability in reaching their conclusions to overturn the convictions. They, instead, either looked to whether the financial institution had knowledge of the structured transactions, concluded it did not and dismissed the convictions or announced, as in *Gimbel*, that structuring was not illegal for anybody, therefore, no 2(b) liability could be imposed. None of the decisions, however, dispute the applicability of 2(b) to impose criminal liability generally under the Reporting Act, rather 2(b) liability was rejected because the government did not first establish the existence and subsequent breach of some statutory duty.

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> It [was] axiomatic that in [*Polychron*] the bank was alleged to be aware of the statutory duty to report as well as the deliberate efforts to evade that duty . . . . Polychron's alleged complicity in structuring the withdrawal of currency . . . in an effort to avoid the reporting requirement is enough to differentiate this case from *Larson* and others dealing with the criminal liability of bank customers who structure currency transactions. . . . Polychron willfully caused [the bank] to fail to file the CTRs.

Id. at 836.

We believe that those cases followed by us in *Mastronardo*, focusing concern on the bank's knowledge, did not properly address 2(b) liability. As we have set forth, what the bank, the innocent intermediary here, knew is immaterial for purposes of proving a 2(b) violation by a customer.[13]

Here, American Investors divided its large currency deposits in order to preclude Pittsburgh National Bank from filing CTRs in regard to them. Whether Pittsburgh National Bank had the duty to report the transactions and, thus, the capacity to commit a crime for failure to do so will be discussed, *infra*. Assuming, however, that the bank did have such a legal obligation, the extent of the bank's knowledge of the structure is immaterial for 2(b) purposes. What we focus upon is American Investors', not the bank's intent, and the evidence of American Investors' willfulness in avoiding the reporting requirement is strong. In 1980, when informed by the bank of the necessity to file CTRs for American Investors' over-$10,000 cash deposits, American Investors immediately began structuring its deposits to total under $10,000. This was accomplished by placing large amounts of currency in its safety deposit box at Pittsburgh National Bank and then depositing the cash in staggered amounts into two different accounts. Later, American Investors' utilization of two different branches further

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[13] This retrospective examination in no was repudiates our decision in *Mastronardo*, since, there, the defendants were acquitted of the 2(b) charges. We hold fast to our holding in *Mastronardo* that convictions of customers under the substantive provisions of the Currency Reporting Act, prior to its amendment, violated due process.

shows intent to by-pass Pittsburgh National Bank's requirements to file the CTRs.

Mendicino took deliberate steps to ask the bank how to avoid the reporting requirement. Mendicino's knowledge of the filing requirement is evidenced by that inquiry and also by a previous conversation he had with a government agent on an unrelated matter. An agent for the Drug Enforcement Agency testified that, beginning in 1981, he enlisted Mendicino's cooperation to help track down money-launderers who were also suspected drug traffickers. Mendicino expressed his willingness to assist the DEA and, in fact, permitted the agent to review American Investor's customer list. The agent testified that Mendicino was clearly aware of the reporting obligations of financial institutions when cash transactions exceeded $10,000. This testimony was based upon a number of conversations between the agent and Mendicino which focused the financial practices of money-launderers. There was also evidence that, as a financial institution itself,[14] American Investors should have received communications sent from the National Association of Securities Dealers to all of its members regarding their obligations to file CTRs.

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[14] 31 U.S.C. § 5312(a)(2)(G) defines financial institution to include a broker or dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934. 15 U.S.C. § 78(a) *et seq.*

In this regard, Judge Garth would question whether the rationale of *Mastronardo* has *any* application here. Since American Investors was a financial institution as defined by the Act and chargeable with knowledge of the filing requirements, Judge Garth argues that any legal leeway which American Investors might be afforded as a customer is abridged.

We conclude that although American Investors could not be guilty, merely as a customer, on the Pittsburgh National Bank counts of a substantive violation of the Currency Transactions Reporting Act, the combination of the bank's legal capacity to commit the crime, if found to exist, with American Investors' willful acts to subvert the bank's obligation, would support the convictions of American Investors on these counts.

III.

The next matter is, of course, whether or not, intent notwithstanding, Pittsburgh National Bank had the legal capacity to commit the crime. Resolution of this issue requires us to return to those waters left uncharted in *Mastronardo*: does the Act impose a duty on the bank to report *any* structured cash transactions?

We look first, as we must, to the language of the statute and regulations. The statute itself provides little guidance since, by its terms, it merely authorizes the Secretary to prescribe regulations to govern the reporting of currency transactions.[15]

We turn then to the governing regulations. As previously set out, the regulations require banks to file a report of each deposit, withdrawal and exchange of currency which involves the physical transfer of currency of more than $10,000.[16]

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[15] *See supra* note 2.

[16] *See supra* note 3.

Based upon this language, we must determine whether daily depositing of cash into different accounts and, sometimes, in different branches, in amounts of less than $10,000 but aggregating over this amount, triggers the bank's reporting obligations.

An excellent overview of the parameters of the institution's duty under the Reporting Act was recited by Judge Scirica, now of our court, in *United States v. Shearson Lehman Brothers, Inc.*, 650 F.Supp 490 (E.D. Pa. 1986), *aff'd in part and rev'd in part, United States v. Mastronardo*, 849 F.2d 799 (3d Cir. 1988). After deciding that the language of Treasury Form 4789 could not amplify the meaning of a single "transaction," the court nonetheless held that:

> [T]he statutory scheme imposes a duty on banks to report any transactions exceeding $10,000. Defendants were on notice of the bank's reporting duty which exists without regard to the duty to aggregate that the government sought to impose by means of the Form 4789 instruction. . . . As a result, defendants cannot act to prevent a bank from fulfilling its duty, therefore causing a bank to commit a crime. . . . Defendants did not cause the bank to breach its duty when they entered the bank with structured transactions; they caused the bank to violate the law at the earlier point when they broke up their transaction to avoid the $10,000 CTR requirement.

Id. at 497.[17]

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[17] It is important to note that Judge Scirica's opinion was written in response to the motion to dismiss the indictment issued against the *Mastronardo* defendants, when the 2(b) charges were still viable. Because the defendants were later acquitted of the 2(b) charges, we did not address that statute's applicability on appeal.

Those courts of appeals followed by us in *Mastronardo* have also had opportunity to re-evaluate the statute and its implications in the context of the reporting duty of financial institutions.

For instance, the decision in *United States v. Anzalone* has been examined by the Court of Appeals for the First Circuit in *United States v. Bank of New England, N.A.*, 821 F.2d 844 (1st Cir.), *cert. denied*, 108 S.Ct. 328 (1987). In this case a bank was found guilty of failure to file CTRs for cash withdrawals of one of its customers. On appeal the bank argued that the Act did not give fair warning that the withdrawals in excess of $10,000 effected by a customer's consecutive use of multiple checks, each less than $10,000, was a violation of the Act. The question addressed was whether "the due process requirement of fair warning forbids a reading of the regulations to impose a duty on the banks to file reports on customers who withdraw greater than $10,000 in cash at one time by using multiple checks." The court categorized the customer's multiple withdrawal activity as a single physical transfer of currency which gave the bank fair warning of its duty to report the transactions.

In *Pilla v. United States*, 861 F.2d 1078 (8th Cir. 1988), the Court of Appeals for the Eighth Circuit, citing *United States v. Polychron*, 841 F.2d 833 (8th Cir.), *cert. denied*, 109 S.Ct. 135 (1988) and distinguishing *United States v. Larson*, held that a customer who was also on the board of directors of a bank had a relationship with a bank such that he would have a duty to report a currency transaction. Unlike *Larson*, since the bank was aware of the currency reporting violations, Pilla's aiding and abetting

the bank's violation sufficed to make his conduct criminal. The court thus found that the bank could have a duty to report certain structured transactions.

In *United States v. Hayes*, 827 F.2d 469 (9th Cir. 1987), the Court of Appeals for the Ninth Circuit cautioned that its prior rulings interpreting the language of the Act could not be extended to situations where a banker joined with a customer's attempt to aggregate the transactions to avoid filing CTRs. In *Hayes*, a bank officer was presented with a brown bag containing $113,500 in cash. The officer split that amount into a number of checks of under $10,000 each and delivered them to the customer. The court found that there was no need to aggregate to consider this activity as a single transaction invoking the reporting requirement.

One court already adhering to a broader application of the Reporting Act has, as would be consistent, endorsed liability for financial institutions. In *United States v. Lafaurie*, 833 F.2d 1468 (11th Cir. 1987), *cert. denied*, 108 S.Ct. 2015 (1988), the court held that a bank must file a CTR if multiple currency exchanges of more than $10,000 are made by a single person or his partners or associates in a single day.

In interpreting an institution's liability under the Act, the courts focus on the extent of the bank's knowledge and the particulars of the structured transactions. At the very least, if a bank was an active participant in a laundering scheme, it is clear that liability attaches. In our case, there is no allegation that Pittsburgh National Bank or any of its employees was involved in a scheme with American Investors.

We turn then to the exact nature of the activity under scrutiny and examine how it comports with the elusive meaning of a reportable currency transaction. This is the reason for our introductory comment that our holding in this case is fact specific. The source of consternation is the absence of a reliable definition of a structured transaction, and, if such a transaction occurs, the extent of the bank's duty to unearth its true nature.

To avoid concluding that a bank has a blanket legal duty to aggregate separate occurrences to determine if a reportable transaction has transpired, courts instead choose to label some connected activity as a single transaction clearly contemplated as reportable under the statute and regulations. For example, when different banks are involved, no duty attaches. *United States v. Denemark*, 779 F.2d 1559 (11th Cir. 1986). Also, transactions occurring on different days at the same bank would not invoke the reporting requirement. *United States v. Heyman*, 794 F.2d at 792. Same day transactions at different branches of the same bank, however, are reportable. *United States v. Giancola*, 783 F.2d 1549 (11th Cir.), *cert. denied*, 479 U.S. 1018 (1986); *accord United States v. Polychron*, 841 F.2d at 837.

In this case, the transactions occurred on the same day, and on all occasions but one, at the same branch. We conclude that Pittsburgh National Bank had a duty to report this type of transaction. The question of whether, if aware, the bank would have been required to report the scheme of consecutive deposits has been satisfactorily answered by the record. This is evidenced by the bank manager's expression of concern and rush into action when he discovered that the CTRs were not being filed.

Also, according to the manager, it was his understanding, gleaned from his training and from Pittsburgh National's internal operating procedures, that transactions such as those engaged in by American Investors were reportable. If Pittsburgh National itself had willfully failed to report these transactions it would have been criminally liable under 31 U.S.C. §§ 5313, 5322.

As to American Investors' integral role, although the structuring of transactions as a customer was not per se illegal, a crime was committed when it took steps to cause Pittsburgh National to fail to fulfill its reporting duty. Specifically, the breakdown of cash deposits prevented the bank from filing the required CTRs. The particular activity of same-day, same-branch depositing of cash in amounts under $10,000, usually via consecutive transactions, which, when aggregated, totalled over $10,000, created a statutory violation.[18] American Investors was cognizant of the bank's reporting duty and acted in a manner to prevent the bank from complying with its statutory obligations. Its willfulness merged with the bank's duty in order to violate the currency reporting statute.

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[18] We note that Incident No. 14 in Appendix I refers to an occasion when American Investors utilized two different branches. A single deposit at one of the branches was under $10,000. Although this might appear to take this particular transaction out of our description of reportable activity, because the multiple deposit at the other branch occurring on the same day did fall within our description i.e., two under $10,000 individual transactions, which, when aggregated, totalled over $10,000, the different branch activity of one transaction under $10,000 is not fatal to that count of the indictment.

With respect to Incident No. 15, which corresponds to Count 72 of the indictment, however, the facts outline an occasion involving two cash transactions under $10,000 occurring on two consecutive days, rather than on the same day. Under our conclusion that same day activity constitutes a reportable action, the defendants' convictions under Count 72 would appear to require reversal.

We do not, however, find that an across-the-board reversal of Count 72 is necessary. As to defendants, Bruno, Krzywicki and Mendicino, the sentences imposed under Counts 2-94 were to run concurrent with the sentences imposed under Count 1. Under the concurrent sentence doctrine we have the discretion to avoid resolution of legal issues affecting less than all of the counts in an indictment where at least one count has been upheld and the sentences are concurrent. *United States v. Lampley*, 573 F.2d 783 (1978). The practicality of this doctrine has been praised, *see Jones v. Zimmerman*, 805 F.2d 1125 (3d Cir. 1986), but has not been invoked in instances where the defendant may possibly suffer collateral consequences, such as impaired parole eligibility. *See United States v. Clemons*, 843 F.2d 741 (3d Cir. 1988), *cert. denied*, 109 S.Ct. 87 (1988); *United States v. Theodoropoulos*, 866 F.2d 587 (3d Cir. 1989). The record contains no evidence of any such potential detriment as to the individual defendants here, thus, we are free to appiy the concurrent sentence doctrine.

In contrast, American Investors of Pittsburgh was fined $1,000 for each conviction of Counts 2-94. In this instance the concurrent sentence doctrine will not apply and the conviction under Count 72 must be reversed to

reduce American Investors' fine by $1,000. The convictions on all other counts will, therefore, stand.

IV.

The essence of Zytnick's contention that there is insufficient evidence to support the verdict of guilt of both conspiracy and aiding and abetting American Investors' scheme to circumvent the currency reporting laws is that he was merely an innocent customer of American Investors, who, like other innocent customers, was neither aware of nor concerned with American Investors' duty to file CTRs for cash transactions. We review his claim by examining the record in a light most favorable to the government (the verdict winner) and then determine whether there is substantial evidence to support the jury's guilty verdict. *Glasser v. United States*, 315 U.S. 60 (1942); *United States v. Messerlian*, 832 F.2d 778 (3d Cir. 1987) *cert. denied*, 108 S.Ct. 1291 (1988). Because of the general nature of the verdict, we do not know if the jury found Zytnick guilty on the basis of aiding and abetting American Investors' scheme to avoid filing CTRs under 18 U.S.C § 2(a) or under the theory of *Pinkerton v. United States*, 328 U.S 640 (1946)(sufficient evidence to sustain conspiracy convictions allows substantive counts convictions to stand, even if conspirator did not commit substantive offenses), which would permit Zytnick's convictions for the substantive counts to stand if there is sufficient evidence to sustain his conviction on the conspiracy count. Either basis withstands scrutiny when the evidence is viewed in a favorable light to the government.

In order to prove a conspiracy, the government must show an agreement to commit an unlawful act combined with intent to commit the underlying offense. *United States v. Kapp*, 781 F.2d 1008 (3d Cir.), *cert. denied*, 479 U.S. 821 (1986). The elements of the conspiracy can be proven entirely through circumstantial evidence. The existence of the conspiracy can be inferred from evidence of related facts and circumstances which demonstrate that the activities of the participants could not have been carried out except as a result of a preconceived scheme or common understanding. *Id.* at 1010. Although a conspiracy may be proven entirely by circumstantial evidence, the government must nonetheless prove each element beyond a reasonable doubt – that the alleged co-conspirators shared a unified intent to achieve a common goal and an agreement to work toward the goal. *United States v. Wexler*, 838 F.2d 88 (3d Cir. 1988).

To support vacation of his conviction, Zytnick contends that proof of his participation in the pinpointed cash transactions was not demonstrated. *See* Appendix II. He asserts that since the incidents charged in the indictment did not involve any of his named accounts, it is only American Investors which conducted the fraudulent activity and which bears criminal responsibility. Zytnick references the testimony of an American Investors' broker who had indicated that false recordings of transactions could result from reasons solely of the broker's own intent. This testimony, Zytnick asserts, repudiates any inference that cash transactions iniated by him, yet reported in fictitious accounts, evidence a motive on his part to join in American Investors' scheme to fail to file CTRs.

Zytnick then argues generally that there was no evidence in regard to the overt acts allegedly supporting the conspiracy conviction, and specifically, that there were not any first-hand witnesses to any of his meetings with Krzywicki.

Zytnick also stresses that American Investors never filed a CTR in *any* instance of a cash transaction over 10,000. The significance of this fact, according to Zytnick, is that if in not filing CTRs for Zytnick's currency transactions American Investors diverted from its ordinary course of business, the break would be evidence of Zytnick's involvement in American Investors' omission. Zytnick asserts, however, that the failure of American Investors to *ever* file a CTR removes any significance from this finding.

A brief recital of testimony regarding Zytnick's transactions with American Investors paints a different picture regarding Zytnick's corroboration in American Investors' failure to file the required reports. The evidence shows that transactions engaged in by Zytnick were credited to a number of accounts – some of which had been opened in his name and in names of family members and some of which had been opened in the names of Dennis Lint, Gene Young, Mary Connolly and Hochstine & Guinan. At trial, Mr. Lint and a representative from Hochstine & Guinan testified that they did not authorize any of the Zytnick transactions to be carried by their accounts nor did they have knowledge of the activity in the accounts regarding the Zytnick transactions. Mary Connolly was deceased in 1981. It goes without saying that any activity in her account after her death was unauthorized. In regard to the Gene Young account, the evidence shows

that Zytnick himself opened that account. Investigation failed to unearth Mr. Young; however, the address listed as his residence on American Investors' account was a rental property owned by Zytnick.

While currency was used to make purchases to the Lint, Young, Connolly and Hochstine & Guinan accounts, most of the purchases made in the accounts of Zytnick's own name and family names were made by check. Also, the only type of securities purchased through the Lint, Young and Hochstine & Guinan accounts were municipal bonds which are not issued in the names of the purchaser.[19]

Although no one testified as to seeing money pass between Zytnick and Krzywicki (Zytnick's broker), the evidence did show that Zytnick was a frequent visitor to the American Investors' offices and, on at least one occasion, came into the office with a bag and entered Krzywicki's office. Krzywicki then approached the cage where the cashier was sitting, handed her a large amount of cash and directed her to purchase municipal bonds through one of the non-Zytnick family accounts. Brenda Perfetti, an employee of American Investors, testified that, through Krzywicki, Zytnick would often make purchases of securities with large amounts of cash. Krzywicki would then instruct her as concerning the appropriate accounts in which to place the orders. She

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[19] Only four purchases of municipal bonds were made in accounts listed in the name of Zytnick and members of his family, a fraction of the transactions occurring in these accounts.

recalled using the Lint, Young, and Hochstine & Guinan accounts.

Documentary evidence supports that Zytnick was aware that his cash actually financed securities purchases made through the Lint, Young, Connolly and Hochstine & Guinan accounts. Confirmation slips which evidence buy orders, were introduced into evidence at trial which showed that, although a purchase of a municipal bond was made through one of the non-Zytnick accounts, the confirmation slip had the notation on it to "Deliver to Z." Zytnick's monthly statements did not reflect any transactions into the non-Zytnick accounts. Therefore, it can be inferred that Zytnick was at least aware that Krzywicki was not processing cash transactions through his family accounts.

The evidence also shows that coupons from bonds purchased through the Mary Connolly account were later deposited into Zytnick's account and that coupons subsequently cashed in by Zytnick were credited to the Hochstine & Guinan account. Also, on occasion, money was transferred from the Zytnick family accounts into the Hochstine & Guinan account.

On May 14, 1987, Zytnick gave a statement to the Internal Revenue Service agents. Zytnick admitted that he managed the accounts in his name and in his family's, but he denied that he transacted business through the Lint and Young accounts. In a subsequent interview, however, Zytnick asked the agents what would happen if bonds did appear in the names of other people. The agent testified at trial that he told Zytnick that it would complicate the matter a great deal. It is significant that after this

conversation, coupons from bonds purchased through the Lint, Young, Connolly and Hochstine & Guinan accounts, although mature, were not cashed.

This court has had occasion to overturn conspiracy convictions because the defendant was not proven to have had knowledge of the illegal objective contemplated by the conspiracy. None of these cases present a fact scenario where the actions of the defendant were as intertwined as Zytnick's were with American Investors. *See United States v. Cooper,* 567 F.2d 252 (3d Cir. 1977)(in absence of *some* evidence that defendant knew content of locked compartment or *some* evidence that defendant engaged in communication conspiratorial nature, fact finder could not find beyond reasonable doubt that defendant was member of conspiracy (emphasis in original)); *United States v. Molt,* 615 F.2d 141 (3d Cir. 1980) (vague reverence in letter regarding previous raid of property not sufficient to show knowledge of illegal importation of goods); *United States v. Coleman,* 811 F.2d 804 (3d Cir. 1987) (prior association combined with rental of room does not amount to specific intent necessary to commit conspiracy). But *see United States v. Torres,* 862 F.2d 1025 (3d Cir. 1988), (defendant's residence and workplace nearby known cocaine trafficking area, arrival at scene shortly after other participants' apprehension and instruction by other participant not to resist arrest: "it won't help any", sufficient circumstances to prove conspiracy).

Our review convinces us that a rational trier of fact, *see Jackson v. Virginia,* 443 U.S. 307 (1979), could find that Zytnick participated in this conspiracy to defraud the

government. The evidence here shows that cash transactions engaged in by Zytnick were credited to accounts not in his name and not authorized by those named as the account holders. Zytnick's several meetings with Krzywicki, followed immediately by the cash purchases through the unauthorized accounts with the confirmation tickets evidencing the notation "Deliver to Z" support a strong inference that Zytnick shared the purpose of, intended to achieve and agreed to work toward the goal of obstructing the lawful function of the Internal Revenue Service. Zytnick's own statements to the agents involved in the investigation also reflect his involvement in the conspiracy. On one occasion he even indicated to the agents that he was aware of the CTR filing requirement and then questioned the agents as to the effect of dealing in fictitious accounts. The lack of activity in the fictitious accounts following the conversations is strong supportive evidence of knowledge on Zytnick's part.

Under *United States v. Pinkerton,* the evidence to sustain Zytnick's conviction on the conspiracy count set forth *supra* renders valid the convictions for the substantive counts even though Zytnick himself did not commit the offense.

The convictions also withstand scrutiny on the aiding and abetting charge. Clearly, under *United States v. Mastronardo,* Zytnick could not be charged with the substantive offense of failing to file CTRs since he had no duty to do so.[20] To support a conviction on the charge of aiding

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[20] The government contends that discussion and resolution of the *Mastronardo* issue should not affect the convictions of Zytnick because although he joined in the issues raised by the other defendants he did not specifically address the issue

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and abetting, the government must show that Zytnick in some way associated himself with the criminal venture as something he wished to bring about and that he sought by his actions to make it succeed. *United States v. Bey*, 736 F.2d 891 (3d Cir. 1984), quoting *Nye & Nissen v. United States*, 336 U.S. 613 (1949).

Zytnick's frequent meetings with Krzywicki, followed immediately by the recording of cash purchases in the non-Zytnick accounts, outline affirmative action of his part to align himself with American Investors' criminal attempts to avoid the reporting requirements. No one disputes that Zytnick could not be charged as a principal; however, the evidence supporting the conspiracy conviction demonstrates with equal force the elements required to support an aiding and abetting conviction. Thus, as either an aider or abettor, or a member of the conspiracy Zytnick's convictions will be upheld.[21]

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in his brief nor is the issue similar to the ones raised by the other defendant. We conclude that Zytnick's joinder of issues request, coupled with his argument that if he had been aware of the CTR requirement he could have structured his transactions to avoid any violation, is sufficient to put the issue of the impact of the holding of *Mastronardo* before us. We nonetheless note that the relief afforded to customers under *Mastronardo* does not apply to Zytnick, since he was not charged as willfully causing a violation of the Currency Transactions Reporting Act, but as an aider and abettor thereof.

[21] We note that Zytnick's Count 1 conspiracy count could have been based on either causing American Investors to fail to file CTRs or causing Pittsburgh National Bank to fail to file CTRs. Nevertheless, we believe this convic'ion must be sustained. Given Zytnick's acquittal on the substantive Pittsburgh

(Continued on following page)

V.

American Investors also argues that the district court erred in refusing to suppress the records seized as a result of a search of its premises because the warrant was overbroad, suffers from a lack of particularity and because the executing officers flagrantly disregarded the warrant and conducted an impermissible general search. Citing the purported illegality of the search of its office. American Investors also claims that the records seized from American Investors' storage area should be suppressed since the consent obtained for the search was achieved through exploitation of the prior illegal search. Since this claim involves a constitutional issue, it is subject to our plenary review. The subissue of whether the search exceeded the scope of the warrant is factual and is reviewed under the clearly erroneous standard

In support of its application for a warrant to search American Investors' office and to seize certain documents, the government proffered an affidavit from Special Agent Tate of the Internal Revenue Service, the chief investigator of the alleged money-laundering scheme. The affidavit described categories of American Investors' corporate records which were considered to evidence a failure to file currency transaction reports. The United States Magistrate found probable cause to believe that such evidence would be found and issued warrants

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National counts and his conviction by the jury on the substantive American Investors count, we believe that the jury must have based Zytnick's Count 1 conspiracy conviction on the American Investors prong of the conspiracy. *See, e.g.*, United States v. Asher, 854 F.2d 1483 (3d Cir. 1988), *cert. denied*, 109 S.Ct. 836 (1989).

authorizing searches of American Investors' office and safe deposit boxes. (The warrant was broader in scope than the affidavit in that it extended one of the categories, added others and included a general tail directing the search and seizure of other documents and items which are fruits, and instrumentalities and evidence of the alleged violations.)

Armed with the warrant, thirty-seven government officials entered American Investors' offices and conducted a search over a ten hour period. While executing the warrant, the agents were informed by an employee of American Investors that the corporation utilized a separate area to store documents. After obtaining the consent of Mendicino, Bruno and Krzywicki, the agents also searched this area and seized documents stored there.

Prior to the return of the indictment, Mendicino, Bruno and Krzywicki filed a joint motion for the return of property under Fed.R.Civ.P. 41(e). After the hearing on the motion, the district court found that the affidavit established probable cause that a crime had been committed. Specifically, the court found that the affidavit recited certain "tips" and explained American Investors' scheme to avoid its currency reporting requirements. The district court, however, found that not all of the categories of documents alleged to constitute evidence of the crimes were authorized to be seized under the warrant. In what is referred to as a "close call", the court found that "there [was] no showing that the scheme to avoid filing of the reports was so pervasive to require an inference that all brokerage records were likely to constitute evidence of the crime under investigation," and, in fact, found that 13 of the categories were not authorized to be seized under

the warrant. The court, nonetheless, refused to conclude that the agents acted in bad faith in the warrant's execution. Relying upon *United States v. Leon*, 468 U.S. 897 (1984), which carves out a good faith exception to the fourth amendment exclusionary rule, the district court found that the evidence was obtained by the law enforcement officers acting in reasonable reliance on a search warrant issued by a neutral magistrate. Thus, the ultimate conclusion that the seizure of many of the documents was unsupported by probable cause did not implicate the exclusionary rule since the agents' reliance on the warrant was objectively reasonable.

The district court then found a close relationship between the probable cause challenge and American Investors' contention that the warrant did not describe with particularity the evidence to be seized. The court concluded that, despite the large amounts of documents described, the specific categories satisfied the particularity requirement. This conclusion led to the court's corollary decision that the general tail of the warrant did not render the warrant unconstitutionally general. *See Andresen v. Maryland*, 427 U.S. 463 (1976).

Next, while disparaging the general carelessness of the agents in conducting the search, the district court found that, although portions of the search and seizure appeared to exceed the scope authorized, there was not a flagrant disregard for the warrant which would affect the admissibility of other items seized which fell within the warrant. *United States v. Christine*, 687 F.2d 749, 757 (3d Cir. 1982).

In regard to the search of the storage area the district court could discern no causal link between the seizure of documents not authorized by the warrant and the uncoerced disclosure of the storage area and the agents' request for consent to its search. The district court thus held that the seizure of documents from the storage area did not emanate from a disregard of fourth amendment rights.

On appeal, American Investors concedes that the affidavit established probable cause that violations of the Currency Reporting Act were committed, but nonetheless contends that the warrant was unconstitutionally infirm either because the affidavit did not show a nexus between the records sought and the alleged criminal violations or because each category was overbroad. American Investors identified the investigating agent's lack of expertise as the cause for the wide ambit of documents seized under the heading of probable cause. For the three categories found by the district court to be properly encompassed by the warrant, American Investors disputes even their inclusion because the warrant was not limited to a specific day, did not identify particular currency transactions, was duplicative of records already obtained by the government from Pittsburgh National Bank, or involved customers of American Investors who were not involved in cash transactions.

Our review of a probable cause issue for a search warrant is limited by *Illinois v. Gates*, 462 U.S. 213 (1983). In reviewing a determination as to the existence of probable cause, we must assure ourselves that the magistrate had a substantial basis for concluding that probable cause existed. *Id.* at 238-39. As noted, American Investors is not

challenging the existence of probable cause itself, rather the range of documents sought as probative of the alleged violations is challenged.

Here the magistrate had before her an affidavit from Special Agent Tate detailing his participation in the investigation of the alleged criminal violations of Titles 31 and 18 by American Investors. Tate stated that he received information from a confidential source that American Investors was laundering substantial amounts of currency and then received corroborative information that American Investors had not filed CTRs with the Internal Revenue Service. The affidavit then outlined that a subpoena *duces tecum* was served on Pittsburgh National Bank for its records concerning American Investors. The affidavit set forth facts demonstrating techniques utilized by American Investors to launder large amounts of currency internally to evade reporting requirements. As a necessary corollary, the affidavit also detailed an analysis of deposits to Pittsburgh National Bank checking accounts, activity regarding American Investors' safe deposit boxes as Pittsburgh National Bank, testimony of an SEC enforcement staff accountant, CTRs which were filed by Pittsburgh National Bank and an examination which showed that no CTRs were filed by American Investors.

To support the types of records which should be seized, Tate represented that he consulted with an SEC agent familiar with the variety of documents retained by brokerage firms. The affidavit then outlined 19 categories of documents, later amended to include 23, believed to be evidence of the crimes at issue. The magistrate found the

allegations in the affidavit sufficient to support the government's belief that these documents could evidence that American Investors was involved in a scheme to cover up the receipt of currency. Accordingly, the magistrate issued a warrant for their seizure.

Despite the limited review of the magistrate's decision in these instances, the district court substituted a *de novo* interpretation of the affidavit for that of the magistrate's and found that a number of the categories of the warrant were not supported by probable cause.[22] We need not, however, comment on the district court's extended scope of review since it reached the correct conclusion on the suppression issue. The affidavit clearly supported the fact that a broad range of documents would be entailed in sorting out the details of this sophisticated scheme. The fact that the warrant authorized a search for a large amount of documents and records does not necessarily render the search invalid so long as there exists a sufficient nexus between the evidence to be seized and the alleged offenses. Given the complex nature of a money-laundering enterprise, we cannot say that the categories overdescribed the extent of the evidence sought to be seized.

Closely intertwined in America Investors' overbreadth challenge. We conclude that Special Agent Tate alleged sufficient expertise and information that the categories listed in the affidavit were proper evidence of the

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[22] The government has argued in its brief, without cross-appealing, that the district court did in fact err in this finding.

crimes. It is not unreasonable that a large bulk of American Investors' business dealings may have been influenced by the scheme. Therefore, we do not believe that the delineation of the categories was over-broad.

We must now ask whether the warrant, viewed in a common sense fashion, was drawn with sufficient particularity so as not to offend the fourth amendment prohibition against general warrants and "general rummagings." Our review of the warrant indicates that it contained a specific description of the records and documents to be seized and did not suffer from a lack of particularity.

United States v. Leary, 856 F.2d 592 (10th Cir. 1988), cited by American Investors as authority to invalidate the warrant, is distinguishable. In *Leary* that Court of Appeals for the Tenth Circuit held that even a warrant that describes the items to be seized in broad and generic terms may be valid when the description is as specific as the circumstances in the nature of the activity under investigation can permit. The standard, as announced by *Leary*, is that warrants for business records should be as sufficiently particular to meet the requirements of the fourth amendment as the information available would allow. In *Leary*, the warrant was found to be facially overbroad since there was information available to the government to make the description of the items to be seized much more specific. Here, given the range of information required to unravel the laundering scheme and the extent of participation by the parties, the warrant was as specific as circumstances would allow, however broad the requirements of the search might be. We cannot see how any more precise language in the affidavit could have limited the scope of the search authorized by the

magistrate, despite the fact that the language of the warrant was broader than that of the affidavit. In this regard, this case is similar to the facts in *United States v. Kepner*, 843 F.2d 755 (3d Cir. 1988). There we held that when the language of the warrant is broader than that of the affidavit and the officers executing the warrant do not have a copy of the affidavit, in a detailed investigation such as the one before us today, the warrant authorizing the search of documents and records is sufficiently particular for purposes of the fourth amendment. Because the items to be seized were described with sufficient particularity, the general tail, which is not read in isolation, does not render the warrant invalid. *Andresen v. Maryland*, 427 U.S. at 479-482.

Next, in response to American Investors' argument that the good faith exception articulated in *United States v. Leon* cannot apply here, we reference *United States v. Medlin*, 798 F.2d 407 (10th Cir. 1986) which set out the four situations in which *Leon* will not apply:

> (1) the magistrate issued the warrant in reliance on a deliberately or recklessly false affidavit (citing *Franks v. Delaware*, 438 U.S. 254, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978));
>
> (2) the magistrate abandoned his judicial role and failed to perform his neutral and detached function (citing *Lo Ji Sales, Inc. v. New York*, 442 U.S. 329, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979));
>
> (3) The warrant was based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable' (quoting *Brown v. Illinois*, 422 U.S. 5890, 610-11, 95 S.Ct. 2254, 2265, 45 L.Ed.2d. 416 (1975)(Powell, J., concurring)); or

> (4) the warrant was so facially deficient that it failed to particularize the place to be searched or the things to be seized (citing *Massachusetts v. Sheppard*, 468 U.S. 981, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984)).

Id. at 409.

Since there are no allegations that the magistrate acted inappropriately and because we have discounted the allegations that the affidavit was not supported by probable cause or lacked particularity, we stand by the finding of the district court that, under *United States v. Leon*, the good faith exception to the exclusionary rule applies.

To show a deliberate disregard for the warrant's restrictions, it must be demonstrated that a reasonably well-trained officer would have known that the search was illegal, despite the magistrate's authorization. This is a question of objective reasonableness, rather than subjective good faith. *United States v. Leon*, 468 U.S. at 919, n.20.

We once again reference our decision in *Kepner*. Although in *Kepner* there was no evidence that the officers acted beyond the scope of the warrant, we do not read *Kepner* as standing for the proposition that the good faith exception could not apply if evidence outside the scope of the warrant was seized. Rather, the pertinent inquiry is still whether the officers acted reasonably. Phrased another way, given the nature of the search, we ask whether the officers' suspicions have been aroused that certain documents could not be seized under the warrant. Given the necessarily broad scope of the search involved here, we find that the agents reasonable relied

on the magistrate's findings that the affidavit justified the seizure of the wide range of documents.

The objective standard governing the evaluation of the officers' conduct in executing the warrant is also helpful in deciding whether, as American Investors contends, there was a flagrant disregard of its terms. In *United States v. Tamura*, 694 F.2d 591, 594 (9th Cir. 1982) the court held that when the government's unconstitutional seizure of all corporate records, rather than just those described in the search warrant, was motivated by considerations of practicality and not by a desire to engage in indiscriminate fishing, the documents introduced at trial were not required to be suppressed despite the illegality of the wholesale seizure. We do not go so far as to say that all the documents seized from American Investors' office represented an illegal indiscriminate seizure, but we also do not embrace the government's justifying position that the agents were overwhelmed by the enormity of the task before them. What we focus upon is whether the officers' conduct overreached to the extent that it rendered an otherwise valid warrant so general in nature that it failed to authorize a legal search. Although we agree with the district court that the execution of this warrant was far less than a model of constitutional decorum, we cannot say that is rose to an abusive level. Relying on our conclusion that the agents acted in objective good faith, we hold that the district court did not err in failing to suppress evidence on the basis that there was a flagrant disregard for the terms of the warrant.

Since the primary search was not illegal, the consent for the search of the storage area was not tainted and was also proper.

V.

In addition to the contentions addressed, the defendants, separately and collectively, raised a number of other issues which we have reviewed. We conclude that none merits relief from conviction.[23]

The judgments of sentence of all defendants, except for Count 72 against American Investors of Pittsburgh, will be affirmed.

APPENDIX I[1]

1. On or about May 10, 1982, American Investors made three consecutive deposits of currency at PNB, account number 1-256294 for $7,280.35, $8,000 and $8,000.

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[23] Such claims include allegations of error in the district court's failure to suppress evidence obtained as a result of service of a grand jury subpoena made on Pittsburgh National Bank; the district court's denial of defendant Zytnick's motion for a bill of particulars; the district court's denial of Zytnick's motion to dismiss the indictment on due process grounds alleging selective prosecution; admission into evidence of a notice sent by the NASD to its members regarding CTR filing requirements; the district court's denial of Zytnick's request for severance; the district court's instruction to the jury that in determining American Investors' knowledge it could impute the knowledge of any employee; alleged abuse of discretion in the district court's denial of Zytnick's alleged "theory of defense" instruction; the district court's error in charging the jury with respect to the United States v. Pinkerton, 327 U.S. 640 (1946), theory of vicarious liability.

[1] Source Indictment, United States of American v. American Investors of Pittsburgh, *et al.*, No. 87-96, (W.D.Pa. 1987), Record at 18A.

2. On or about May 11, 1982, American Investors made two consecutive currency deposits at PNB, account number 1-256294 for $3,028.44 and $9,000.

3. On or about May 17, 1982, American Investors made two consecutive deposits of currency at PNB account number 1-256294 for $2,311.11 and $9,000.

4. On or about June 21, 1982, American Investors made two consecutive currency deposits at PNB, account number 1-256307 for $7,000, and account number 1-256294 for $8,000.

5. On or about July 16, 1982, American Investors made two consecutive deposits of currency at PNB, account number 1-256294 for $5,000 and $9,971.76.

6. On or about July 19, 1982, American Investors made four consecutive currency deposits at PNB, account number 1-256294 for $7,000, $7,000, $5,000 and $2,140.

7. On or about July 27, 1982, American Investors made three deposits of currency at PNB, account number 1-256307, transaction 168, $9,000, transaction 170, $6,000, and transaction 171, $8,627.46.

8. On or about August 12, 1982, American Investors made three consecutive deposits of currency at PNB, account number 1-256307 for $9,000, $5,000 and $546.20.

9. On or about August 20, 1982, American Investors made two consecutive deposits of currency at PNB, account number 1-256307 for $9,000 and $8,853.

10. On or about August 24, 1982, American Investors made two deposits of currency at PNB account

number 1-256294, transaction 160, $8,250, and transaction 163, $8,215.77.

11. On or about September 13, 1982, American Investors made two consecutive deposits of currency at PNB, account number 1-256307, for $9,000 and $1,926.93.

12. On or about September 29, 1982, American Investors made two consecutive deposits of currency at PNB, account number 1-256294, for $3,749 and $9,000.

13. On or about October 4, 1982, American Investors made two consecutive deposits of currency at PNB, account number 1-256307, for $4,211.55 and $9,000.

14. On or about October 22, 1982, American Investors made three deposits of currency at PNB, the branch numbers, account numbers, transaction numbers and amounts as follows:

(A) 24 1-256307	Transaction No. 694 $8,500
(B) 24 1-256307	Transaction No. 695 $8,500
(C) 28 1-256307	Transaction No. 268 $3,384.21

15. On or about November 3, 1982, American Investors made two consecutive deposits of currency at PNB, account number 1-256294, for $6,000 and account number 1-256307 for $7,000.

16. On or about November 29, 1982, American Investors made two consecutive deposits of currency at PNB, account number 1-256307, for $9,000.31, and account number 1-256294, for $1,536.

17. On or about December 9, 1982, American Investors made two consecutive deposits of currency at PNB,

account number 1-256294, for $9,000.02, and account number 1-256307, for $9,412.

18. On or about December 10, 1982, American Investors made two consecutive deposits of currency at PNB, account number 1-256307, for $9,000, and account number 1-256294 for $2,000.

19. On or about December 30, 1982, American Investors made two consecutive deposits of currency at PNB, account number 1-256307, for $9,000, and 1-256294 for $6,730.36.

20. On or about January 4, 1983, American Investors made two consecutive deposits of currency at PNB, account number 1-256294 for $9,000, and account number 1-256307 for $9,000.

21. On or about January 5, 1983, American Investors made two consecutive deposits of currency at PNB, account number 1-256307 for $8,958.91, and account number 1-256294 for $9,000.

22. On or about January 6, 1983, American Investors made two consecutive deposits of currency at PNB, account number 1-256294 for $9,000, and account number 1-256307 for $9,281.00.

23. On or about January 13, 1983, American Investors made two consecutive deposits of currency at PNB, account number 1-256294 for $9,000, and account number 1-256307 for $9,000.

24. On or about January 19, 1983, American Investors made two consecutive deposits of currency at PNB, account number 1-256294 for $7,003.11, and account number 1-256307 for $9,400.

25. On or about February 15 and 16, 1983, American Investors made two deposits of currency at PNB, account number 1-256307 for $9,000, and $9,250.

26. On or about February 22, 1983, American Investors made two consecutive deposits of currency at PNB, account number 1-256307 for $7,500, and account number 1-256294 for $3,431.85.

27. On or about March 2, 1983, American Investors made two consecutive deposits of currency at PNB, account number 1-256294 for $8,461, and account number 1-256307 for $3,316.02.

28. On or about March 8, 1983, American Investors made two deposits of currency at PNB, account number 1-256294 for $9,500, and account number 1-256307 for $9,368.95.

29. On or about March 9, 1983, American Investors made three deposits of currency at PNB, the account numbers, transaction numbers and amounts as follows:

(A) 1-256294	Transaction No. 046	$6,500
(B) 1-256307	Transaction No. 280	$9,092.13
(C) 1-256307	Transaction No. 281	$2,208

30. On or about March 10, 1983, American Investors made two consecutive deposits of currency at PNB, account number 1-256294 for $4,356, and account number 1-256307 for $9,000.

31. On or about March 11, 1983, American Investors made two consecutive deposits of currency at PNB, account number 1-256294 for $9,000, and account number 1-256307 for $9,000.

32. On or about March 14, 1983, American Investors made two consecutive deposits of currency at PNB, account number 1-256294 for $9,000, and account number 1-256307 for $8,950.00.

33. On or about March 15, 1983, American Investors made two deposits of currency at PNB, account number 1-256294, transaction 476, $9,650.49, and account number 1-256307, transaction 478, $9,000.

34. On or about March 16, 1983, American Investors made two consecutive deposits of currency at PNB, account number 1-256294 for $9,400, and account number 1-256307 for $9,600.

35. On or about March 17, 1983, American Investors made two consecutive deposits of currency at PNB, account number 1-256294 for $9,400, and account number 1-256307 for $9,600.

36. On or about March 18, 1983, American Investors made two consecutive deposits of currency at PNB, account number 1-265294 for $8,170, and account number 1-256307 for $9,208.84.

37. On or about April 27, 1983, American Investors made two consecutive deposits of currency at PNB, account number 1-256294, for $7,995.67, and account number 1-256307 for $7,100.

38. On or about May 2, 1983, American Investors made two consecutive deposits of currency at PNB, account number 1-256294, for $5,473.37, and account number 1-256307 for $8,000.

39. May 6, 1983, American Investors made two consecutive deposits of currency at PNB, account number

1-256307 for $1,100, and account number 1-256294 for $8,999.10.

APPENDIX II[1]

1. On or about May 25, 1982, American Investors, through Charles Krzywicki, received $16,362 in currency from Alan Zytnick, which was credited to account number 20042, "Hochstine & Guinan."

2. On or about August 3, 1982, American Investors, through Charles Krzywicki, received $11,000 in currency from Alan Zytnick, which was credited to account number 20046-1, "Hochstine & Guinan."

3. On or about August 10, 1982, American Investors, through Charles Krzywicki, received $10,100 in currency from Alan Zytnick, which was credited to account number 20046-1, "Hochstine & Guinan."

4. On or about August 31, 1982, American Investors, through Charles Krzywicki, received $48,000 in currency from Alan Zytnick, which was credited to account number 20046-1, "Hochstine & Guinan."

5. On or about September 9, 1982, American Investors, through Charles Krzywicki, received $27,000 in

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[1] Source: Indictment, United States of America v. American Investors of Pittsburgh, *et al.*, No. 87-96 (W.D. Pa. 1987), Record at 18A.

currency from Alan Zytnick, which was credited to account number 20046-1, "Hochstine & Guinan."

6. On or about September 10, 1982, American Investors, through Charles Krzywicki, received $51,265.93 in currency from Alan Zytnick, which was credited to account number 20003-1, "Dennis Lint."

7. On or about September 10, 1982, American Investors, through Charles Krzywicki, received $19,279.07 in currency from Alan Zytnick, which was credited to account number 20046-1, "Hochstine & Guinan."

8. On or about September 16, 1982, American Investors, through Charles Krzywicki, received $68,400.21 in currency from Alan Zytnick, which was credited to account number 20003-1, "Dennis Lint."

9. On or about September 21, 1982, American Investors, through Charles Krzywicki, received $63,000 in currency from Alan Zytnick, which was credited to account number 20003-1, "Dennis Lint."

10. On or about September 22, 1982, American Investors, through Charles Krzywicki, in two separate transactions, received $18,000 and $24,000 in currency from Alan Zytnick, which was credited to account number 20003-1, "Dennis Lint."

11. On or about September 30, 1982, American Investors, through Charles Krzywicki, received $73,870 in currency from Alan Zytnick, which was credited to account number 20003-1, "Dennis Lint."

12. On or about October 12, 1982, American Investors, through Charles Krzywicki, received $54,550 in currency from Alan Zytnick, which was credited to account number 20003-1, "Dennis Lint."

13. On or about October 13, 1982, American Investors, through Charles Krzywicki, received $43,000 in currency from Alan Zytnick, which was credited to account number 20003-1, "Dennis Lint."

14. On or about October 14, 1982, American Investors, through Charles Krzywicki, received $18,000 in currency from Alan Zytnick, which was credited to account number 20003-1, "Dennis Lint."

15. On or about October 15, 1982, American Investors, through Charles Krzywicki, received $62,800 in currency from Alan Zytnick, which was credited to account number 20003-1, "Dennis Lint."

16. On or about October 19, 1982, American Investors, through Charles Krzywicki, received $27,000 in currency from Alan Zytnick, which was credited to account number 20003-1, "Dennis Lint."

17. On or about October 20, 1982, American Investors, through Charles Krzywicki, received $15,500 in currency from Alan Zytnick, which was credited to account number 20003-1, "Dennis Lint."

18. On or about October 26, 1982, American Investors, through Charles Krzywicki, received $34,160 in currency from Alan Zytnick, which was credited to account number 20003-1, "Dennis Lint."

19. On or about October 27, 1982, American Investors, through Charles Krzywicki, received $32,500 in currency from Alan Zytnick, which was credited to account number 20003-1, "Dennis Lint."

20. On or about October 28, 1982, American Investors, through Charles Krzywicki, received $28,500 in currency from Alan Zytnick, which was credited to account number 20003-1, "Dennis Lint."

21. On or about October 29, 1982, American Investors, through Charles Krzywicki, received $30,583.43 in currency from Alan Zytnick, which was credited to account number 20003-1, "Dennis Lint."

22. On or about November 1, 1982, American Investors, through Charles Krzywicki, received $13,700 in currency from Alan Zytnick, which was credited to account number 20003-1, "Dennis Lint."

23. On or about December 15, 1982, American Investors, through Charles Krzywicki, received $18,000 in currency from Alan Zytnick, which was credited to account number 20032-1, "Mary Connolly."

24. On or about December 16, 1982, American Investors, through Charles Krzywicki, received $32,988.31 in currency from Alan Zytnick, which was credited to account number 20032-1, "Mary E. Connolly," and account number 20171-1, "Gene Young."

25. On or about December 17, 1982, American Investors, through Charles Krzywicki, received $10,646.21 in currency from Alan Zytnick, which was credited to account number 20032-1, "Mary E. Connolly."

26. On or about April 15, 1983, American Investors, through Charles Krzywicki, received $11,840.59 in currency from Alan Zytnick, which was credited to account number 20171-1, "Gene Young."

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN THE MATTER OF:	)	
SEARCH WARRANTS ISSUED BY	)	
THE UNITED STATES DISTRICT	)	83-142 M
COURT FOR THE WESTERN DIS-	)	83-143 M
TRICT OF PENNSYLVANIA ON	)	
MAY 13, 1983, at MAGISTRATE	)	
NOS. 83-142 and 83-143	)	

MEMORANDUM OPINION

American Investors of Pittsburgh, Inc., a securities broker-dealer, came under investigation for possible violations of the currency transaction reporting laws. Based upon an affidavit, two search warrants were issued by a magistrate authorizing the search of American Investors' offices and safe deposit boxes. Consent to the search of a storage area was obtained from the principals of American Investors. Approximately 37 government agents seized approximately 157 boxes of documents.

The principals of American Investors move for the return and suppression of seized property under Fed.R.Cr.P. 41(e). Petitioners contend the search warrants were not supported by probable cause; the search warrants did not describe the items to be seized with sufficient particularity; the search of the offices exceeded the scope of the warrant; and the consent to search the storage area was tainted by the prior illegal search.

Inevitable discovery

In *Nix v. Williams*, 81 L.Ed.2d 377 (1984), the Supreme Court announced an inevitable discovery exception to the

Fourth Amendment exclusionary rule. The Court held even if incriminating statements had not been unlawfully elicited from the defendant, the victim's body would ultimately or inevitably have been discovered by a search party, and therefore evidence pertaining to the discovery and condition of the body were admissible in defendant's murder trial.

The government contends the documents seized could have been the subject of a federal grand jury subpoena *duces tecum* and the subpoena would have survived a motion to quash. Because the documents seized would have inevitably been discovered in this manner, return and suppression is not proper.

The government has not established inevitable discovery within the *Williams* decision. Inevitable discovery involves no speculative elements but focuses on demonstrated historical facts. *Id.* at 388 n. 5. In *Williams* uncertainty as to whether the body would have been discovered could be resolved in the government's favor only because the government adduced evidence demonstrating that at the time of the constitutional violation an investigation was already underway which, in the natural and probable course of events, would have soon discovered the body. *Id.* at 396 (concurring opinion).

Here the speculative nature of the government's position is apparent on its face. In fact, the affiant explained that a subpoena was not used because "we felt the records would be destroyed if we subpoenaed them."

Probable cause

Petitioners contend everything seized from American Investors' offices and safe deposit boxes should be returned and suppressed because the affidavit does not show sufficient probable cause to support any provision of the warrants. Specifically, petitioners contend first, that the affidavit does not show probable cause that a crime has been committed; second, as to the warrant directed to the safe deposit boxes, there is no reasonable ground to believe the things to be seized will be found there; and third, there is no reasonable ground to believe the things to be seized are evidence of the crime charged.

The affidavit establishes probable cause that a crime has been committed. The affidavit explains that American Investors is required to report currency transactions exceeding $10,000. The affidavit states Internal Revenue Service records show that American Investors did not file currency transaction reports. The affidavit recites tips corroborated by American Investors' bank records showing a pattern of multiple bank deposits of less than $10,000 in currency. This establishes probable cause that currency transaction reporting violations occurred.

As to the warrant directed to the safe deposit boxes, the affidavit establishes probable cause that the things to be seized will be found there. The affidavit shows daily and regular use of safe deposit boxes located in the same building as American Investors' offices. It is reasonable to infer that the safe deposit boxes were an integral part of American Investors' business operation.

Whether there is reasonable ground to believe the things to be seized are evidence of the crime under investigation is more troublesome. The warrants authorize seizure of 19 categories of documents. Three of the categories relate to currency transaction reports and may be disregarded because the affidavit establishes probable cause that they would not be found and they were not found.

Petitioners concede three other categories possibly reflect currency transactions: cash receipts and disbursements blotter(s); bank statements, deposit tickets, canceled checks; and customer ledger account documents. As to these three categories the probable cause showing in the affidavit covers years before the subpoenaed bank records, days in addition to those on which more than $10,000 in currency was deposited in the bank, and customers in addition to those disclosed by the currency receipts blotters.

On the other hand, the affidavit does not establish probable cause that the remaining 13 categories constituted or contained evidence of violations of the currency transaction reporting laws. The crime under investigation is a scheme to evade the filing of currency transaction reports, not the underlying exchange of currency for something of value. The fact that the form to be filed on currency transactions requires disclosure of the nature of the transaction does not make the nature of the transaction evidence of a reporting violation. Nor does the fact that the currency transaction reports are to aid the government in criminal, tax and regulatory investigations and proceedings make the nature of the transaction evidence of a reporting violation.

There is no showing that the scheme to evade filing of currency transaction reports was so extensive that it could be reasonably inferred that all the brokerage records were likely to constitute evidence of the crime under investigation. The suspected criminal activity went to only one aspect of the business and only documents relating to that aspect could be seized. *See U.S. v. Brien*, 617 F.2d 299, 306 (1st Cir. 1980), *cert. denied*, 446 U.S. 919 (1980).

Concededly, the case is close and the decision reached with difficulty, but on reflective consideration the Court is constrained to conclude that the 13 categories exceed the probable cause showing.

In *U.S. v. Leon*, 82 L.Ed.2d 677 (1984) the Supreme Court announced a good faith exception to the Fourth Amendment exclusionary rule. The Court held the exclusionary rule does not bar the use of evidence obtained by law enforcement officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause.

Here a detached and neutral magistrate issued the warrants now found to be partially unsupported by probable cause. The agents' reliance on the warrants was objectively reasonable. Thus under *Leon* the return and suppression of the property seized under the 13 categories is not required.

Particularity

Closely intertwined with petitioners' probable cause challenge is their contention that everything seized from American Investors' offices and safe deposit boxes should be returned and suppressed because the warrants were general warrants that did not particularly describe the things to be seized.

Because the warrants authorize in effect the search and seizure of all the documents in each category the warrants do not suffer from a lack of particularity. *See U.S. v. Christine*, 687 F.2d 749, 753 (3d Cir. 1982). Here, as in *Application of Lafayette Academy*, 610 F.2d 1, 5 (1st Cir. 1979), the directions to the executing officers are straightforward – they are to cart away all documents.

In addition to authorizing the search and seizure of 19 categories of documents, the "general tail" of each warrant authorizes the search and seizure of any document that is the fruit, instrumentality or evidence of currency transaction reporting violations, as well as conspiracy and aiding and abetting violations. Because the 19 categories satisfy the particularity requirement, the general tail does not render the warrants unconstitutionally general. *See Andersen (sic) v. Maryland*, 427 U.S. 463, 480-482 (1976).

Scope of search

Petitioners contend everything seized from American Investors' offices and safe deposit boxes should be returned and suppressed because the executing officers

conducted a general search in violation of the Fourth Amendment.

Special Agent C. Robert Tate testified that 95 to 97% of the items seized fell within the 19 categories listed in the warrants. Richard Knight, a certified public accountant, testified for petitioners that 31 to 33% of the items seized fell outside the 19 categories. Included in the documents seized were:

1. "pink sheets", published lists of prices of over-the-counter securities;
2. twelve pages of dirty jokes;
3. "Spa Lady Four Day Diet to Lose 10 Pounds;"
4. *NASD Manual;*
5. more than one hundred annual reports;
6. more than one hundred blank power of attorney forms;
7. more than one thousand empty envelopes;
8. more than one hundred empty file folders;
9. more than two hundred business cards of one of American Investors' brokers;
10. blank fingerprint cards;
11. blank Uniform Application for Securities Industry Registration forms;
12. blank broker-dealer state license applications;
13. photocopied pages of the Pennsylvania Securities Act;
14. 1979 Personal Property Tax Return and 1981 Federal Income Tax Return for the elderly mother of one of American Investors' principals

as well as her insurance policies and the lease of a building owned by her;

15. Florida securities regulations;
16. SEC forms 10K and 10Q;
17. loan agreements;
18. prospectuses;
19. lists of potential customers;
20. newspaper and magazine articles;
21. American Investors' paid bills;
22. American Investors' unpaid bills, including one from counsel for an unrelated matter;
23. death certificates;
24. American Investors' new employee guidelines;
25. a prototype pension plan and joinder agreement;
26. information concerning American Investors' Employee Payroll Deduction Stock Purchase Plan;
27. Standard & Poor's and Moody's publications;
28. pamphlets;
29. notes of a bond sales contest among American Investors' brokers.
30. commission reports and voucher portions of paychecks; and
31. press releases.

Petitioners have made a strong showing that the search and seizure of American Investors' offices and safe deposit boxes exceeded the scope authorized by the warrants. There was not, however, a flagrant disregard for

the terms of the warrants which would affect the admissibility of other seized items which fall within the warrants. *See U.S. v. Heldt*, 668 F.2d 1238, 1259 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 926 (1982); *U.S. v. Christine*, 687 F.2d at 757. Rather the execution of the warrants was marred with misjudgment, carelessness and haste. Accordingly return and suppression of approximately 46,000 documents seized from the offices and safe deposit boxes of American Investors which are beyond the authorization of the warrants as identified by Richard Knight will be ordered.

Consent

Petitioners contend everything seized from American Investors' storage area should be returned and suppressed because the consent to search the storage area was obtained by exploitation of the prior illegal search of American Investors' offices and safe deposit boxes.

Before applying for the warrants the government was not able to determine if American Investors kept records in a storage area. During the search, an employee interviewed by agents indicated that there was a storage area. The agents then obtained the consent of American Investors' principals and searched the storage area. Approximately 73 boxes of records were seized.

Having found that there was an illegal seizure of documents not authorized by the warrants for the search of American Investors' offices and safe deposit boxes, it must be determined whether the consent to search the storge (*sic*) area "has been come at by exploitation of that illegality or instead by means sufficiently distinguished

to be purged of the primary taint." *Brown v. Illinois*, 422 U.S. 590, 599 (1975) (quoting *Wong Sun v. U.S.*, 371 U.S. 471, 488 (1963)).

The consent was given during the search without any intervening circumstances. On the other hand, the consent was voluntary and not coerced, and the seizure of documents not authorized by the warrants resulted from misjudgment, carelessness and haste and not from a flagrant disregard of Fourth Amendment rights.

More importantly, any causal link between the excessive document seizure and the consent is tenuous at best. There is no direct connection between the seizure of documents not authorized by the warrants and the disclosure of the storage area and the request for consent to search it. Had the search and seizure proceeded within the bounds of the warrants the existence of the storge (*sic*) area would probably have been disclosed and consent to search it requested. The voluntariness of the consent further indicates that the excessiveness of the search and seizure did not create a coercive atmosphere which was then exploited by the government to gain consent.

For all of the foregoing reasons the return and suppression of documents seized from American Investors' offices and safe deposit boxes not authorized by the warrants will be granted; the motion will be denied in all other respects. An appropriate order shall issue.

Dated: October 22, 1984.

/s/ Hubert I. Teitelbaum
Hubert I. Teitelbaum
Chief United States District Judge

ORDER

AND NOW October 22, 1984 in accordance with the foregoing memorandum opinion, IT IS HEREBY ORDERED that the return and suppression of documents identified by Richard Knight as not being authorized by the search warrants for American Investors' offices and safe deposit boxes is granted.

IT IS FURTHER ORDERED that the motion is denied in all other respects.

/s/ Hubert I. Teitelbaum
Hubert I. Teitelbaum
Chief United States District Judge

cc: Richard Wile, Esq.
Stanton D. Levenson, Esq.
1615 Frick Building
Pittsburgh, PA 15219
For Petitioners

Jeffrey A. Manning
Assistant United States Attorney
633 United States Courthouse
Pittsburgh, PA 15219
For Government

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-3169/70/71, 88-3231 and 88-3232

THE UNITED STATES

vs.

AMERICAN INVESTORS OF PITTSBURGH, INC.
JOHN J. BRUNO
JOHN W. MENDICINO
CHARLES KRZYWICKI
ALAN ZYTNICK
LOUIS J. PECORI

JOHN J. BRUNO,

Appellant in No. 88-3169

(D.C. Crim. No. 87-96-2)

THE UNITED STATES

vs.

AMERICAN INVESTORS OF PITTSBURGH, INC.
JOHN J. BRUNO
JOHN W. MENDICINO
CHARLES KRZYWICKI
ALAN ZYTNICK
LOUIS J. PECORI

JOHN W. MENDICINO,

Appellant in No. 88-3170

(D.C. Crim. No. 87-96-3)

THE UNITED STATES

vs.

AMERICAN INVESTORS OF PITTSBURGH, INC.
JOHN J. BRUNO
JOHN W. MENDICINO
CHARLES KRZYWICKI
ALAN ZYTNICK
LOUIS J. PECORI

ALAN ZYTNICK,

Appellant in No. 88-3171

(D.C. Crim. No. 87-96-5)

THE UNITED STATES

vs.

AMERICAN INVESTORS OF PITTSBURGH, INC.
JOHN J. BRUNO
JOHN W. MENDICINO
CHARLES KRZYWICKI
ALAN ZYTNICK
LOUIS J. PECORI

AMERICAN INVESTORS OF PITTSBURGH, INC.

Appellant in No. 88-3231

(D.C. Crim. No. 87-96-1)

THE UNITED STATES

vs.

AMERICAN INVESTORS OF PITTSBURGH, INC.
JOHN J. BRUNO
JOHN W. MENDICINO
CHARLES KRZYWICKI
ALAN ZYTNICK
LOUIS J. PECORI

CHARLES KRZYWICKI,

Appellant in No. 88-3232

(D.C. Crim. No. 87-96-4)

Appeal from the United States District Court
for the Western District of Pennsylvania
Present: HIGGINBOTHAM, MANSMANN and GARTH,
Circuit Judges

J U D G M E N T

These causes came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and were argued by counsel December 1, 1988.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered March 14, 1988 in D.C. Crim. Nos. 87-96-2 and 87-96-3, March 16, 1988 in D.C. Crim. No. 87-96-5, and on April 5, 1988 in D.C. Crim. Nos. 87-96-01 and 87-96-04, be, and the same are hereby affirmed except insofar as the conviction against American Investors of Pittsburgh in D.C. No. 87-96-01 on Count 72 which is reversed. All of the above in accordance with the opinion of this Court.

Attest:

/s/ M. Elizabeth Ferguson
Chief Deputy Clerk

June 29, 1989

Certified as a true copy and issued
in lieu of a formal mandate as to
Nos. 88-3169/70 on August 18, 1989.

Test: /s/ SALLY MRVOS

Clerk, U.S. Court of Appeals for
the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-3169

THE UNITED STATES

vs.

AMERICAN INVESTORS OF PITTSBURGH, INC.
JOHN J. BRUNO,

Appellant

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD and GARTH, *Circuit Judges*.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Chief Judge Gibbons and Judge Hutchinson would have granted rehearing.

BY THE COURT

/s/ Carol Los Mansmann
Circuit Judge

AUG 10 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-3170

THE UNITED STATES

vs.

AMERICAN INVESTORS OF PITTSBURGH, INC., etc.
JOHN W. MENDICINO

Appellant

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD and GARTH, *Circuit Judges*.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Chief Judge Gibbons and Judge Hutchinson would have granted rehearing.

BY THE COURT

/s/ Carol Los Mansmann
Circuit Judge

AUG 10 1989

SEARCH WARRANT ON WRITTEN AFFIDAVIT

UNITED STATES DISTRICT COURT

DISTRICT
WESTERN DISTRICT OF PENNSYLVANIA

DOCKET NO. MAGISTRATE'S CASE NO.
83-142-M

UNITED STATES OF AMERICA

v.

Premises known as American Investors of Pittsburgh, Inc., located at 1380 Centre City Towers Building, 650 Smithfield Street, Pittsburgh, PA 15222.

TO: U.S. Marshal, Special Agent of Criminal Investigation Division, Internal Revenue Service, or other authorized officer.

Affidavit(s) having been made before me by the below-named affiant that he has reason to believe that (on the premises known as) American Investors of Pittsburgh, Inc., located at 1380 Centre City Towers Building, 650 Smithfield Street, Pittsburgh, PA 15222, which is a commercial premises described as offices immediately to the right of the exit from the bank of elevators on the 13th floor. The wall on the left inside the glass door entrance bears the inscription: American Investors of Pittsburgh, Inc., in the Western District of Pennsylvania there is now being concealed certain property, namely documents and records as fully described on Pages 30 through 34 of the attached affidavit, including:

1. Cash Receipts and Disbursements Blotter(s).
2. Purchases and Sales Blotter(s).
3. Receipts and Deliveries Blotter.
4. Bank Statements, Deposit Tickets, Canceled Checks.
5. Stock Position Records.
6. Order Tickets.
7. Confirmations.
8. Customer Ledger Account Documents.
9. New Account Documents.
10. Handbooks.
11. Delivery Receipts.
12. Stock Certificates, Bearer Bonds (Municipal, Corporate, etc.), Cashier's Checks, Travelers Checks, and Money Orders.
13. Correspondence and Currency.
14. Currency Transaction Reports (IRS, Form 4789).
15. Currency Transaction Report Summary Documents.
16. Currency Transaction Report Exemption List(s).
17. Financial Statements.
18. Ledgers.
19. Record of the Proof of Money Balances.

Other documents and items which are fruits, instrumentalities and/or evidence of violations of Title 31,

United States Code, Section 5313 *and* Title 18, United States Code, Sections 2 and 371.

(SEE ATTACHED PAGE 2)
and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person or premises above-described and the grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s).

YOU ARE HEREBY COMMANDED to search on or before May 23, 1983 (not to exceed 10 days) the person or place named above for the property specified, serving this warrant and making the search (in the daytime – 6:00 A.M. to 10:00 P.M.) and if the property be found there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the property seized and promptly return this warrant to Honorable Ila Jeanne Sensenich or other federal magistrate as required by law.

NAME OF AFFIANT
C. Robert Tate, Special Agent
Internal Revenue Service

SIGNATURE OF JUDGE OR US MAGISTRATE
/s/ IJS

DATE/TIME ISSUED
5/13/1983 11:30 a.m.

AFFIDAVIT FOR SEARCH WARRANT

I, C. Robert Tate, have been employed as a special agent for the Internal Revenue Service, Criminal Investigation Division (hereinafter IRS-CID) at Pittsburgh, Pennsylvania, since 1971. As a special agent for the Internal Revenue Service, I have been trained in financial investigative techniques and accounting, and have conducted and participated in numerous investigations of criminal violations of the Internal Revenue Code and related offenses. Further, I testified before the Federal grand jury and in Federal court on many occasions. I have been the Title 31 Project Coordinator for the last 18 months. In this capacity, I have attended seminars on Title 31, plus consulted and established a working liaison with the Federal Reserve Bank, Comptroller of Currency, Federal Deposit Insurance Corporation, Securities and Exchange Commission, and other enforcement agencies. Besides performing as a special agent, in the past year, I have also been designated to act as group manager on five occasions for a period of approximately four months. I am presently on a three-month acting group manager assignment.

Since January 10, 1983, I have assisted in a Federal grand jury investigation of alleged criminal violations of Title 31, United States Code, Sections 5313 and 5322(b) and Title 18, United States Code, Sections 2 and 371 by American Investors of Pittsburgh, Inc., 1380 Centre City Towers Building, 650 Smithfield Street, Pittsburgh, Pennsylvania 15222 (hereinafter American Investors). The Uniform Application for Registration, License, or Membership as a Broker-Dealer, Securities and Exchange Form BD, filed by American Investors with the Securities and Exchange Commission (hereinafter SEC) on April 26, 1979, a copy

of which I received from the SEC in March 1983, revealed that since February 1979, the responsible corporate officers of American Investors have been John J. Bruno, President; John W. Mendicino, Vice President; and Charles Krzywicki, Secretary/Treasurer. All are registered representatives of American Investors and each has an individual office at the firm's business location.

The Form BD reveals that John J. Bruno resides at 4004 Berger Lane, Monroeville, Pennsylvania 15146. In February 1983, I was informed by Special Agent Joseph J. Hirsch III, that U.S. Postal Inspector Ronald Baronosky told IRS Special Agent Joseph J. Hirsch, III, that Postal records show John W. Mendicino presently resides at 847 N. Richhill Street, Waynesburg, Pennsylvania 15370, and that Charles Krzywicki presently resides at 96 Lintel Drive, McMurray, Pennsylvania 15317.

This affidavit is based upon my personal knowledge and information related to me by IRS-CID Special Agent Joseph J. Hirsch III; and SEC Division of Enforcement, Staff Accountant Gene Albarado, CPA.

The information developed in this investigation demonstrates that American Investors and individuals unknown to the Government have been, and are now, involved in a scheme to evade the Title 31 reporting requirements of financial institutions relative to the reporting of currency transactions in amounts over $10,000 to the IRS. The scheme defrauds the United States by impeding the lawful function of the IRS in its collection of data and reports of currency transactions in excess of $10,000, and is in violation of Title 31, United States Code, Section 5313 and

5322(b). The scheme, which will be set forth later in this affidavit, includes the following:

(A) American Investors' receipt of large amounts of currency (in excess of $10,000) from an individual and/or individuals.

(B) American Investors' failure to file Forms 4789, Currency Transaction Reports, reporting its receipt of currency from one individual in excess of $10,000.

(C) American Investors' deposit of this currency into two Pittsburgh National Bank (hereinafter PNB) business checking accounts in individual deposit amounts less than or equal to $10,000, even though on numerous occasions the total currency deposited into one bank account per visitation far exceeds $10,000.

Based on 31 U.S.C. 5312(g) American Investors is considered a financial institution and is required to file Currency Transaction Reports (hereinafter CTR) by 31 U.S.C. 5313. A CTR, IRS Form 4789 (*Exhibit A*), is required to be filed with the IRS within 15 days of the currency transaction date by the financial institution involved whenever a currency transaction exceeds $10,000. Multiple currency transactions by or for any person or entity, which in any one day total more than $10,000, should be treated as a single transaction. The CTR's, IRS Form 4789, must identify the individual transacting the currency, the owner of the currency, and the institution reporting this financial transaction. CTR's, Forms 4789, must state the total amount of currency transacted, amounts of currency in denominations of $100 or higher and other details regarding the transaction, transactor, and owner.

During the course of my investigation, I have developed the following facts:

1. The investigation originated on or about September 16, 1982, when I received information from a confidential source #1 that during 1982, American Investors was laundering substantial amounts of currency derived from the sale of narcotics by an individual and/or individuals in the Pittsburgh area and was not filing CTR's as required to do so.

2. On September 21, 1982, I received a Treasury Enforcement Communications System printout (hereafter TECS check) establishing that American Investors of Pittsburgh, Inc., had not filed CTR reports with the Internal Revenue Service. Further, other telephonic TECS checks made by me approximately once each month through May 11, 1983 show no CTR reports have been filed by American Investors or any of its officers.

3A. On January 11, 1983, a grand jury subpoena duces tecum was served on PNB requesting various bank information on American Investors of Pittsburgh, Inc., and its corporate officers for the period "1981 to the present." On February 23, March 14, April 6, and April 19, 1983, records were received by the Federal grand jury pursuant to this subpoena and were disclosed to Hirsch and me by Assistant U.S. Attorney Jeffrey manning (*sic*) pursuant to Rule 6 of the Federal Rules of Criminal Procedure. The records included monthly ledger statements; deposit slips; and items of deposit for two American Investors checking accounts, #1-256294 and

#1-256307; safe deposit entry records for two American Investors safe deposit boxes, #994 and #1008; and copies of 32 CTR's filed by PNB for currency deposits made by American Investors.

3B. Analyses of these records prepared by Special Agent Hirsch and reviewed by me show that American Investors utilizes two (2) checking accounts, account numbers 1-256294 and 1-256307, at PNB, Seventh Avenue Office, 650 Smithfield Street, Pittsburgh, on a daily basis and that substantial currency deposits were made into these accounts during the years 1981 and 1982. This currency was deposited in individual deposit amounts of $10,000 or less during 1981 and individual deposit amounts all less than $10,000 during 1982 (except for one currency deposit on January 6, 1982, that equaled $10,000) even though the aggregate currency deposited per visitation to the bank exceeded $10,000 on approximately 79 occasions. Specifically, evidence shows that in 1981 and 1982, American Investors deposited approximately $534,824 and $1,865,635, respectively, in currency into these two bank accounts at PNB, for a total of approximately $2,400,460.

3C. Summarized below is the individual currency deposits for September 1982 from one of American Investors' bank accounts (#1-256294) at PNB:

American Investors of Pittsburgh, Inc.
Operating Account
PNB – Account Number 1-256294
September 1982

Date of Deposit	Currency Deposited	Total Currency Deposited	Bank Branch	Bank Teller	Bank Teller Transaction Number	Number of Deposit Tickets
9/9/82	$9,000	$ 9,000	28	3	202	1
9/10/82	9,000		28	3	212	
9/10/82	9,000		28	3	213	
9/10/82	9,000		28	3	214	
9/10/82	9,000		28	1	222	
9/10/82	9,000		28	1	223	
9/10/82	9,000	54,000	28	4	261	6
9/16/82	9,000		28	1	128	
9/16/82	9,000		28	1	130	
9/16/82	6,400		28	1	133	
9/16/82	9,000		28	1	134	

American Investors of Pittsburgh, Inc.
Operating Account
PNB – Account Number 1-256294
September 1982

Date of Deposit	Currency Deposited	Total Currency Deposited	Bank Branch	Bank Teller	Bank Teller Transaction Number	Number of Deposit Tickets
9/16/82	9,000		28	1	135	
9/16/82	9,000		28	1	137	
9/16/82	8,000		28	1	138	
9/16/82	9,000	68,400	28	1	139	8
9/21/82	9,000		28	6	110	
9/21/82	9,000		28	6	111	
9/21/82	9,000		28	6	113	
9/21/82	9,000		28	6	142	
9/21/82	9,000		28	6	143	
9/21/82	9,000		28	6	144	

American Investors of Pittsburgh, Inc.
Operating Account
PNB – Account Number 1-256294
September 1982

Date of Deposit	Currency Deposited	Total Currency Deposited	Bank Branch	Bank Teller	Bank Teller Transaction Number	Number of Deposit Tickets
9/21/82	9,000	63,000	28	6	145	7
9/22/82	9,000		28	6	084	
9/22/82	9,000	18,000	28	6	085	2
9/29/82	9,000		28	7	—	
9/29/82	3,749	12,749	28	7	—	2
9/30/82	9,000		24	3	229	
9/30/82	8,000		24	3	230	
9/30/82	9,000		24	3	231	
9/30/82	9,000		28	3	480	
9/30/82	9,000		28	3	481	
9/30/82	9,000		28	3	482	
9/30/82	9,000		28	3	484	
9/30/82	2,870		28	3	377	
9/30/82	9,000	73,870	28	6	377	9
	$299,019	$299,019				35

3D. The above multiple currency deposit pattern occurred every month during 1981 and 1982 with the exception of June, August, and October 1981 and July 1982. The analysis shows that the individual currency deposit amounts are being kept equal to or under $10,000, and that on numerous occasions, the individual bank teller transaction numbers are in numerical order thereby showing that several deposits of currency occurred during the same bank visitation. The analysis also reveals that the only times American Investors used a different PNB branch, other than the Seventh Avenue office to make deposits into its bank accounts, was when American Investors made multiple currency deposits into the Seventh Avenue branch.

3E. To further illustrate how the currency was being deposited into American Investors' bank account #1-256294 at PNB, an analysis of deposits for three different days is presented below:

9/21/82 – Total deposits (all currency)	$63,000

The deposits into this account for the above amount consisted of seven individual deposit tickets reflecting only currency on each deposit ticket in the amount of $9,000. The deposit tickets reflect that teller #6 of branch 28 handled these transactions and the transaction numbers were 110, 111, 113, 142, 143, 144, and 145.

9/30/82 – Total deposits (currency and checks)	$118,863.23

These deposits consisted of:

7 deposit tickets at $9,000 currency each	$ 63,000.00
1 deposit ticket at $8,000 currency	8,000.00
1 deposit ticket at $2,870 currency	2,870.00
9 deposit tickets indicating currency totalling	$ 73,870.00
1 deposit ticket listing checks only	44,993.23
10 total deposit tickets representing currency and checks for total deposits of	$118,863.23

Branch 24, teller #3 handled the following deposits with transaction numbers 229, 230, and 231; branch 28, teller #3 handled numbers 480, 481, 482, 484, 485, and 486; branch 28, teller #6 handled the $9,000 deposit with transaction number 377.

10/15/82 -- Total deposits (currency and checks)	$64,087.50

These deposits consisted of:

6 deposit tickets at $9,000 currency each	$54,000.00
1 deposit ticket at $8,800 currency	8,800.00
7 deposit tickets for currency only	$62,800.00
1 deposit ticket for checks	1,287.50
8 deposit tickets for currency and checks for total deposits of	$64,087.50

Branch 28, teller #3 handled transaction numbers 154, 155, 458, 460, 461, and 462; branch 28, teller #7 handled transaction numbers 225 and 235.

4. On or about March 29, 1983, I received additional information from confidential source #1 that American Investors was still continuing to make multiple deposits of currency in amounts less than $10,000. This information was subsequently corroborated by bank records received by the Federal grand jury pursuant to a subpoena duces tecum issued May 4, 1983.

5A. On May 4, 1983, a federal grand jury subpoena duces tecum was served on Pittsburgh National Bank requesting bank information on American Investors and its corporate officers for the period January 11, 1983, to May 4, 1983. Similar information and records, as noted above, were received by the grand jury on May 11, 1983, pursuant to this subpoena and disclosed to Agent Hirsch and me by Assistant U.S. Attorney Jeffrey A. Manning pursuant to Rule 6 of the Federal Rules of Criminal Procedure.

5B. Analyses of these records prepared by Special Agent Hirsch and reviewed by me reveal that American Investors maintains two checking accounts (#'s 1-256294 and 1-256307) at PNB. During January, February, March, and April of 1983, multiple currency deposits continued to be made to American Investors' accounts at PNB; however, these deposits were split between both accounts so that no single deposit exceeded $10,000, whereas the total amount deposited to both accounts each day exceeded $10,000 on most occasions. The analyses show that in March 1983 large amounts of currency were deposited into these two accounts, and one currency deposit of less than $10,000 per day was deposited into each account. The March currency deposits are summarized below:

Summary of Currency Deposits
American Investors of Pittsburgh, Inc.
PNB Accounts #1-256294 and #1-256307
For the Period March 1, 1983 through March 31, 1983

Date of Deposit	Currency Deposited #1-256294	Currency Deposited #1-256307	Total Currency Deposited	Bank Branch	Bank Teller	Bank Teller Transaction Number	Number of Deposit Tickets
3/2/83	$ 8,461.00			28	3	355	
3/2/83		$ 3,316.02	$11,777.02	28	3	356	2
3/4/83	7,394.33		7,394.33	28	7	192	1
3/7/83	8,940.00		8,940.00	28	3	351	1
3/8/83	9,368.95			28	3	261	
3/8/83		9,500.00	18,868.95	28	–	—	2
3/9/83	9,092.13			28	3	281	
3/9/83		6,500.00		28	7	046	
3/9/83		2,208.00	17,800.13	28	3	288	3
3/10/83	4,356.00			28	4	—	
3/10/83		9,000.00	13,356.00	28	4	201	2
3/11/83	9,000.00			28	3	532	
3/11/83		9,000.00	18,000.00	28	3	533	2
3/14/83	8,950.00			28	4	2—	

Summary of Currency Deposits
American Investors of Pittsburgh, Inc.
PNB Accounts #1-256294 and #1-256307
For the Period March 1, 1983 through March 31, 1983

Date of Deposit	Currency Deposited #1-256294	Currency Deposited #1-256307	Total Currency Deposited	Bank Branch	Bank Teller	Bank Teller Transaction Number	Number of Deposit Tickets
3/14/83		9,000.00	17,950.00	28	4	—	2
3/15/83	9,000.00			28	3	478	
3/15/83		9,670.49	18,670.49	28	3	476	2
3/16/83	9,400.00			28	4	—	
3/16/83		9,600.00	19,000.00	28	4	—	2
3/17/83	9,400.00			28	3	364	
3/17/83		9,600.00	19,000.00	28	3	365	2
3/18/83	9,208.84			28	4	223	
3/18/83		8,170.00	17,378.84	28	4	—	2
3/21/83		902.64	902.64	28	5	199	1
3/22/83		493.86	493.86	28	3	310	1
3/25/83		1,012.50	1,012.50	28	5	275	1
3/31/83	570.20		570.20	28	3	502	1
Total	$103,141.45	$87,973.51	$191,114.96				

The one currency deposit per day into each account compared to the prior multiple currency deposits into one account shows a change in the pattern of currency deposits. However, on four occasions, March 2, 11, 15, and 17, 1983, the separate currency deposits into each account were made at the same visitation with each deposit being less than $10,000 while the aggregate exceeded $10,000. Based on my experience and expertise as a special agent of the IRS-CID, I believe that American Investors took their failure to file CTR scheme a step further by making only one currency deposit per day into each account, so that PNB would not file CTR's on American Investors, or they have opened other checking accounts at other banks, making currency deposits there, or they have become aware of the Government's interest in their deposits and discontinued the multiple currency deposits.

6. A review of safe deposit box entry records relative to two American Investors safe deposit boxes (#994 and #1008) maintained at the Seventh Avenue office of PNB located at 650 Smithfield Street, Pittsburgh, Pennsylvania, shows that American Investors has maintained both deposit boxes during the period 1981 to the present. The entry records reflect that on a daily basis from January 1, 1981, to April 30, 1983, authorized personnel entered either one or both (usually) safe deposit boxes twice each day. The entries into the safe deposit boxes occurred generally between 9:00 a.m. and 10:00 a.m. and between 3:00 p.m. and 4:00 p.m. Based on my knowledge and experience as a special agent, it is my opinion that these safe deposit boxes are not only being utilized by the

firm as a place of safekeeping away from the firm's premises, but also as part of the firm's storage area for important records, documents, securities, currency, and negotiable instruments.

7A. A review of PNB's CTR's reveals that 32 CTR's, Form 4789, were filed by PNB, Seventh Avenue office, for currency deposits totalling approximately $1,035,000 by American Investors. These CTR's cover the period August 27 through October 29, 1982, and reveal that 29 of the 32 currency deposits totalling $918,000 were made in denominations of "$100 bills or higher." During this period, August 27 through October 29, 1982, a total of 64 calendar days and 46 workdays, American Investors' currency deposits per workday averaged approximately $22,500.

7B. Only two PNB CTR's show the name of the person conducting the transaction. They are Brenda Perfetti and John Holowchak, known to me to be employees of American Investors from that firm's safe deposit box entry records received from PNB. The CTR printout dated March 3, 1983, from TECS, which I reviewed, showed 31 CTR's that PNB had filed for American Investors with the IRS for the above period. This printout shows John Holowchak as the person making the deposit for American Investors.

7C. The fact that PNB filed CTR's for American Investors does not release American Investors from the responsibility of filing a CTR for customer currency transactions American Investors encounters because both PNB and American Investors are considered

financial institutions and each is required to file CTR's as required by 31 CFR 103.11 and 103.22. For example, if an American Investors customer purchased 1000 shares of stock at $30 per share plus commission and paid a total of $30,500 in currency for this purchase to American Investors, American Investors is required by law to file a CTR with the IRS on this transaction. Further, when American Investors deposited this currency in total into its PNB bank accounts, PNB would have to prepare a CTR on American Investors; therefore, two CTR's are required to be filed.

8. The most current SEC files on American Investors made available to me in March 1983 show American Investors filed an amended application dated April 23, 1979, for registration as a broker dealer with the SEC showing a change of name and officers. Since that date, American Investors has been examined by the SEC and has corresponded and communicated with the SEC. The SEC rules and regulations and files on American Investors reveals the following:

A) American Investors has been located at 1380 Centre City Towers, 650 Smithfield Street, Pittsburgh, at least since April 23, 1979.

B) The Securities and Exchange Act of 1934, as contained in the Code of Federal Regulations, Sections 240.17(A)-3 through (A)-9 requires that American Investors, a broker-dealer, make and keep current certain books and records relating to its business. These records are detailed in Section 240.17(A)-3. Further, these records are

required to be maintained for a period of not less than six years, the first two years in an easily accessible place (Section 240.17(A)-4). Said records are more fully described and set forth on Pages 30 through 34 of this affidavit.

C) SEC Regulation 240.17(A)-8 requires that every registered broker or dealer who is subject to this requirement of the Currency and Foreign Transaction Reporting Act of 1970, shall comply with this reporting, recordkeeping and retention requirement of Title 31.

D) The SEC examination reports reveal that American Investors utilizes both manual and computer systems to process its paperwork and maintain its books and records. In a letter, Charles Krzywicki, Secretary/Treasurer, sent to the SEC dated April 21, 1981, he states that American Investors utilizes Computer Research, Inc., as its computer processor.

9. The affiant personally went to the office of American Investors on Thursday, May 12, 1983, and observed American Investors open for business as a broker-dealer. I also observed through the door entrance windows, books, records, file cabinets, papers, etc., on American Investors' premises. Further, within the past month, I have heard advertisements for American Investors as a a (*sic*) brokerage firm on the radio.

10. Gene Albarado, CPA and Staff Accountant, Enforcement Division, Washington, D.C., Regional Office of the Securities and Exchange Commission, advised

the affiant that he has been employed with the Securities and Exchange Commission for approximately nine years. Prior to this, he was employed as an Internal Revenue Agent with the Internal Revenue Service and worked in that capacity for five years. Albarado informed me of the following:

a. His duties at the SEC consists (*sic*) of participating in investigations of possible violations of the United States Securities laws with emphasis on auditing and financial analysis of books, records and financial statements of the individuals and/or entities involved.

b. Albarado testified before Federal grand juries in Philadelphia and Pittsburgh, Pennsylvania, and in Federal District Courts in Alexandria, Virginia; Philadelphia; and Pittsburgh, all relative to cases involving Federal securities law violations. He has also testified before the Securities and Exchange Commission, Administrative Law Judge in Washington, D.C. On all occasions, Albarado was qualified as an expert accounting witness for the Government relative to securities violations.

c. Albarado is also an adjunct professor at Benjamin Franklin University in Washington, D.C., where he has taught accounting and auditing for the past seven years.

d. The subpoenaed Pittsburgh National Bank records were all disclosed to CPA Albarado by Assistant U.S. Attorney Jeffrey A. Manning pursuant to Rule 6 of the Federal Rules of Criminal

Procedure, solely for the purpose of assisting the United States Attorney in the performance of his duty to enforce Federal criminal law, on May 3, 1983. He also reviewed all SEC examination reports and documents relative to American Investors. Based on Albarado's experience, expertise and review of all records, he informs me that he believes American Investors violated the Title 31 reporting requirements in not filing currency transaction reports because of the following facts:

1. The frequency of currency deposits made by American Investors.

2. The number of deposit slips utilized by American Investors to make currency deposits on one visitation on the same day.

3A. The currency deposit amount always being less than or equal to $10,000.

3B. The total amount of currency deposited by American Investors over the investigative period, especially from August 27, 1982, through October 29, 1982, was extremely unusual for any brokerage firm since most transactions are paid for by check.

4. The fact that multiple currency deposits were transacted sequentially with the same teller at one visitation.

5. The fact that multiple deposits of currency were made when the entire deposit of currency could have been made with one deposit which

is the usual manner in normal business practice.

6. The fact that American Investors utilized a different PNB branch office to make currency deposits, when on the same day American Investors made currency deposits into the Seventh Avenue branch located in the same building as American Investors, is extremely unusual in normal business practice. Further, only currency deposits were made in other branches.

e. American Investors' receipt and deposit of currency from 1981 to the present should be reflected in the various books and records required to be maintained by the brokerage firm as detailed in the aforementioned paragraphs.

f. Based on the safe deposit box entry records and his professional experience and expertise, he reasonably concludes that American Investors is utilizing the PNB safe deposit boxes as a place of safekeeping and depository for currency, securities, and other negotiable instruments as an extension of their office. Further, Albarado strongly believes that all items in the safe deposit boxes should be inventoried to corroborate American Investors' books and records.

g. Albarado has reason to believe that American Investors' books and records are kept on their premise because the SEC reports and records show the records are kept there. Further, as one of the SEC agents assigned to this investigation,

he has not been informed by the SEC that American Investors' records have been moved by American Investors from its premise or that the records were destroyed. American Investors is required to inform the SEC immediately of any removal or destruction of records. Said records are specifically and fully set forth in this affidavit on Pages 30 through 34 and are incorporated as if fully set forth herein.

h. CPA Albarado believes that the deposited currency is being used to purchase some type of municipal or corporate bearer bond or other negotiable instrument, such as cashier's checks, which are all very difficult to trace.

i. CPA Albarado directly participated in an investigation of a brokerage firm of which Charles Krzywicki was the secretary/treasurer in 1977 and 1978. The investigation disclosed evidence that Krzywicki maintained a second set of cash blotters at the brokerage firm. Therefore, Albarado reasonably concludes that a second set of a particular record or records may be maintained at American Investors.

Based on my experience as a special agent and the foregoing affidavit, I have probable cause to believe that violations of 31 U.S.C. 5313 and 5322(b), and 18 U.S.C. 2 and 371 have occurred and are occurring. The above-cited facts give me probable cause to believe that American Investors, and consequently, the responsible officers of this firm, and others as yet unknown, have been, and are, involved in a scheme to evade the Title 31 reporting requirements. This scheme is evidenced by the analysis of

deposits of American Investors' Pittsburgh National Bank checking accounts, the testimony of SEC Enforcement Staff Accountant Albarado, the CTR's filed by PNB, and the TECS check that shows no CTR's were filed by American Investors. Finally, I have probable cause to believe that on the premise known as 1380 Centre City Towers Building, 650 Smithfield Street, Pittsburgh, Pennsylvania 15222, and the two (2) safe deposit boxes, numbers 994 and 1008, at Pittsburgh National Bank, Seventh Avenue Office, 650 Smithfield Street, Pittsburgh, Pennsylvania 15222, there will be found the fruits, instrumentalities, and evidence of the above-referenced Federal crimes by American Investors, its officers, and individuals as yet unknown. This evidence will be found in and/or consist of the following books, records, documents, memoranda, etc.

1. *Cash Receipts and Disbursements Blotter(s)* – Itemized daily listing of original entry of all receipts and disbursements of currency, checks, and all other debits and credit.

2. *Purchases and Sales Blotter(s)* – An itemized daily record of original entry of all purchases and sales of securities or other negotiable instruments.

3. *Receipts and Deliveries Blotter* – An itemized daily record of original entry of all receipts and deliveries of securities, including individual certificate numbers.

4. *Bank Statements, Deposit Tickets, Canceled Checks.*

5. *Stock Position Record* – Ledgers or document reflecting all long and short securities transactions.

6. *Order Tickets* – Memorandum, statements, or document of each brokerage order.

7. *Confirmations* – Memorandum, statement, or document confirming all purchases, sales, and/or transfers sent or delivered to customers.

8. *Customer Ledger Account Document* – Document for each customer detailing all purchases, sales, receipts, deliveries and/or transfer of securities cash and margin position and all other debits and/or credits.

9. *New Account Document* – Cards, statements, or other designated document detailing information about each client including agreements and related records, letters, and other papers.

10. *Handbook* – A record or other designated document kept by each registered representative showing each customer, their transactions, and a cross-reference to stocks purchased or sold by the brokers' customers.

11. *Delivery Receipts* – Return receipts and/or documents verifying delivery of securities to customers by person, mail, or other means.

12. *Stock Certificates, Bearer Bonds (Municipal, Corporate, etc.), Cashier's Checks, Travelers Checks, and Money Orders.*

13. *Correspondence* – Memoranda, letters, etc., of communication (oral and written) between the brokers and customers.

14. *Currency Transaction Reports (IRS, Form 4789)* – Retained copies and blanks.

15. *Currency Transaction Report Summary Document* – Ledger, journal, or other designated document listing filed Forms 4789 and retained transmittal letters to the Internal Revenue Service.

16. *Currency Transaction Report Exemption List* – Listing, ledger, journal, or other designated document showing exempt customers which include dates, application, specific periods of exemption for each customer, and related documents.

17. *Financial Statements* – Profit and loss statement and balance sheets which show the firm's profit margin and assets and liabilities.

18. *Ledgers* – Record reflecting monies borrowed and loaned, and securities or bonds failed to receive and failed to deliver.

19. *Record of the Proof of Money Balances* – Record of money balances of all ledger accounts.

Accordingly, I request authorization to search the premises known as 1380 Centre City Towers Building, 650 Smithfield Street, Pittsburgh, Pennsylvania, and the interior of two safe deposit boxes, numbers 994 and 1008, located at Pittsburgh National Bank, Seventh Avenue Office, 650 Smithfield Street, Pittsburgh, Pennsylvania, and to seize the items listed in Paragraphs 1 through 19 of Pages 30 through 34 of this affidavit.

/s/ C. ROBERT TATE
Special Agent
Internal Revenue Service
United States Department of Justice

Subscribed and sworn to before me this day, May 13, 1983.

/s/ Ila Jeanne Sensenich
United States Magistrate

No. 89-618

In the Supreme Court of the United States

OCTOBER TERM, 1989

JOHN J. BRUNO and JOHN W. MENDICINO,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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26 pp

QUESTIONS PRESENTED

1. Whether the Currency and Foreign Transactions Reporting Act, 31 U.S.C. 5311 *et seq.*, and the regulations promulgated thereunder, prohibit structuring transactions in order to cause a financial institution to fail to file Currency Transaction Reports.

2. Whether the district court properly admitted evidence seized during the execution of a search warrant.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-59) is reported at 879 F.2d 1087. The memorandum opinion and order of the district court (Pet. App. 60-70) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 71-73) was entered on June 29, 1989. Petitions for rehearing were denied on August 10, 1989 (Pet. App. 74-75). The petition for a writ of certiorari was filed

on October 10, 1989 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioners were each convicted on one count of conspiring to defraud the United States and to make material false statements in a government matter, in violation of 18 U.S.C. 371 (Count 1); on 46 counts of failing to file and causing American Investors of Pittsburgh, Inc. (AIP) to fail to file Currency Transaction Reports (CTRs), in violation of 31 U.S.C. 5313 and 5322(b) (Counts 2-47); and on 47 counts of causing the Pittsburgh National Bank (PNB) to fail to file CTRs, in violation of 31 U.S.C. 5313 and 5322(b) (Counts 48-94). Petitioner Mendicino was sentenced to a two-year term of imprisonment on the conspiracy count and to a $10,000 fine on Count 2. Petitioner Bruno was sentenced to a two-year term of imprisonment on the conspiracy count and to a $25,000 fine on Count 2. Both were sentenced to concurrent three-month terms of imprisonment on the 92 remaining counts, to be served concurrently with the sentence imposed on the conspiracy count. See Pet. 5-6.

1.a. At the time of the offenses, co-defendant American Investors of Pittsburgh, Inc. (AIP) was a broker and dealer of securities, registered with the Securities and Exchange Commission. Petitioner Bruno was AIP's President, while petitioner Mendicino was the company's Executive Vice President.[1]

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[1] Co-defendants Charles Krzywicki, AIP's Secretary-Treasurer, and Alan Zytnick, an AIP customer, were also

The evidence at trial showed that between 1979 and 1983 petitioners and their co-defendants engaged in a conspiracy to fail to file and to cause a financial institution to fail to file CTRs for numerous currency transactions in excess of $10,000.[2] During this period,

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convicted. Along with AIP, both Krzywicki and Zytnick filed petitions for a writ of certiorari. This Court denied certiorari in those cases. See *American Investors of Pittsburgh, Inc.* v. *United States*, cert. denied, No. 89-491 (Nov. 6, 1989); *Zytnick* v. *United States*, cert. denied, No. 89-520 (Nov. 6, 1989).

[2] Under federal law, a financial institution is required to file a CTR whenever a customer engages in a currency transaction in excess of $10,000. 31 U.S.C. 5313; 31 C.F.R. 103.22(a) (1982).

Section 5313(a) of Title 31, U.S.C., provides in relevant part:

> When a domestic financial institution is involved in a transaction for payment, receipt, or transfer of United States coins or currency * * * in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes.

Section 103.22(a) of Title 31 of the Code of Federal Regulations provides:

> Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000. Such reports shall be made on forms prescribed by the Secretary and all information called for in the forms shall be furnished.

Each Currency Transaction Report form contained the following provision (Treasury Form 4789 (1980)):

> * * * Multiple transactions by or for any person which in any one day total more than $10,000 should be treated

AIP repeatedly received more than $10,000 in currency at a time from its customers, including co-defendant Zytnick, but it never filed a CTR. AIP devised various recordkeeping devices to disguise those cash receipts, such as using dead or inactive accounts. Petitioners assisted that operation by altering AIP's records and customers' monthly statements, so that cash transactions of more than $10,000 were inaccurately portrayed as a series of transactions in amounts of less than $10,000 a day. Pet. App. 9-10, 55-59.

AIP maintained two accounts at a branch of the Pittsburgh National Bank (PNB) in which the company deposited its cash receipts. After it learned in September 1980 that the bank would have to file CTRs on currency transactions of more than $10,000 AIP began structuring its deposits so that no single deposit exceeded $10,000. The company accomplished that by making multiple deposits of less than $10,000 —but aggregating to more than $10,000 on a single day—into one or both of its accounts. Pet. App. 10-11, 49-55.

In September 1982, a new PNB branch manager advised AIP that the bank would have to file CTRs when AIP's cash transactions at the bank in a single day aggregated to more than $10,000. When Mendicino asked the bank manager how filing could be avoided, the manager told him that AIP should have been filing CTRs itself. On at least one occasion thereafter, AIP conducted business at two branches of the bank, rather than transacting its business at a single branch, as it had before. Pet. App. 11-12.

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as a single transaction, if the financial institution is aware of them.

b. On May 13, 1983, a United States magistrate issued a search warrant for AIP's offices. Pet. App. 12. The warrant identified 19 categories of records to be searched for and seized, together with a final category authorizing the search and seizure of "[o]ther documents and items which are fruits, instrumentalities, and/or evidence of violations of Title 31, United States Code, Sections 5313 *and* Title 18, United States Code, Section 2 and 371." Pet. App. 77-78.

In support of the warrant, Special Agent C. Robert Tate of the Internal Revenue Service, Criminal Investigative Division, filed an extensive affidavit. Pet. App. 79-103. In the affidavit, Agent Tate stated that he had received information from a confidential source that AIP was laundering substantial amounts of money obtained from narcotics trafficking without filing CTRs; that he had confirmed from IRS records that AIP was not filing CTRs; and that records of AIP's accounts at PNB showed that in 1981 and 1982 AIP had deposited a total of approximately $2.4 million in currency in individual amounts of $10,000 or less, even though the amounts deposited per visit exceeded $10,000 on approximately 79 occasions. *Id.* at 82-83. The affidavit also stated that AIP's currency activities were continuing. *Id.* at 90-93.

Pursuant to the warrant, 37 government agents conducted a ten-hour search of AIP's offices. During the search, an AIP employee informed the agents that AIP stored documents in a separate area. After obtaining consent from petitioners and from Krzywicki, the agents searched that area as well. Pet. App. 40.

Before the indictment was returned, petitioners filed a motion pursuant to Fed. R. Crim. P. 41(e) for

return of the seized property. Following an evidentiary hearing, the district court granted the motion in part and denied it in part. Pet. App. 60-70. The court found that Agent Tate's affidavit established probable cause to believe that currency transaction violations had occurred. It concluded, however, that 13 of the categories of items to be searched exceeded the scope of the probable cause established by the affidavit. *Id.* at 62-64. Nevertheless, the court found that the agents had relied on the warrant in good faith, and it accordingly held that the seized evidence need not be returned or suppressed on overbreadth grounds. *Id.* at 64. The district court also held that the warrant was sufficiently particular, notwithstanding the general category contained at the end of the warrant. *Id.* at 65. Finally, the district court found that, although the execution of the search exceeded the scope of the warrant to the extent of some 46,000 documents, this was not the result of "a flagrant disregard for the terms of the warrant[]," but rather was the product of "misjudgment, carelessness and haste." Pet. App. 67-68. Accordingly, the court ordered that only the identified 46,000 documents be returned to petitioners and suppressed for purposes of trial. *Id.* at 68.

2. The court of appeals affirmed. Pet. App. 1-59. The court held that although petitioners, as bank customers, could not be held liable for substantive violations of the Currency and Foreign Transactions Reporting Act, they were properly convicted, pursuant to 18 U.S.C. 2(b), for causing PNB to fail to file CTRs. Pet. App. 14-31. The court also held that the district court did not err in admitting the evidence seized from AIP's offices. *Id.* at 39-48. It stated that "[t]he affidavit clearly supported the fact

that a broad range of documents would be entailed in sorting out the details of this sophisticated scheme," and the court concluded that "[g]iven the complex nature of a money-laundering enterprise," it could not say "that the categories overdescribed the extent of the evidence sought to be seized." *Id.* at 44. The court also held that the warrant was sufficiently particular (*id.* at 45-46), that the agents had acted in good faith (*id.* at 46-47), and that there had been no deliberate disregard of the warrant's restrictions (*id.* at 47-48).

ARGUMENT

1. Petitioners contend (Pet. 10-21) that this Court should review the government's theory that it is illegal to structure currency transactions so as to avoid the currency reporting requirements. The same claim has been before the Court in several recent cases, and in each case the Court has denied certiorari. See *Meros* v. *United States*, No. 89-39 (Oct. 30, 1989); *Lafaurie* v. *United States*, 108 S. Ct. 2015 (1988); *Perlmutter* v. *United States*, 108 S. Ct. 1110 (1988); *Florez* v. *United States*, 108 S. Ct. 1014 (1988); *Giancola* v. *United States*, 479 U.S. 1018 (1986); *Heyman* v. *United States*, 479 U.S. 989 (1986). In our briefs in opposition in those cases, we noted that there has been some division among the circuits on this and related issues arising from prosecutions under Section 5313.[3] Congress, however, has recently enacted the Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-18, which is included as Subtitle H of the Anti-Drug

[3] We have furnished counsel with a copy of our brief in opposition in the *Meros* case, in which we restated the arguments that we had previously made in the *LaFaurie*, *Perlmutter*, *Florez*, *Giancola*, and *Heyman* cases.

Abuse Act of 1986, Pub. L. No. 99-570, § 1351, 100 Stat. 3207. The Money Laundering Control Act was expressly designed to overrule the cases that conflict with the result reached by the court of appeals here. The new law deprives the statutory issue presented in the petition of any continuing significance. Accordingly, petitioners' claim does not warrant further review by this Court.

a. Under Section 5313 and its accompanying regulations, only financial institutions have a duty to file CTRs in connection with cash transactions. Several courts of appeals have nevertheless recognized that under 18 U.S.C. 2(b) a defendant may still be held criminally liable for causing a financial institution to violate its statutory duties. *United States* v. *Lafaurie*, 833 F.2d 1468, 1470-1471 (11th Cir. 1987), cert. denied, 108 S. Ct. 2015 (1988); *United States* v. *Richeson*, 825 F.2d 17 (4th Cir. 1987); *United States* v. *Heyman*, 794 F.2d 788 (2d Cir.), cert. denied, 479 U.S. 989 (1986); *United States* v. *Cook*, 745 F.2d 1311 (10th Cir. 1984), cert. denied, 469 U.S. 1220 (1985); *United States* v. *Puerto*, 730 F.2d 627 (11th Cir.), cert. denied, 469 U.S. 847 (1984); *United States* v. *Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983). See also *United States* v. *Thompson*, 603 F.2d 1200 (5th Cir. 1979). Other courts have taken a contrary view, holding that because 31 U.S.C. 5313 and the applicable regulations do not impose on third parties a duty to file CTRs, Section 2(b) cannot be read to impose criminal liability on third parties who, by structuring their transactions, cause a financial institution to fail to file a CTR. See, *e.g.*, *United States* v. *Gimbel*, 830 F.2d 621, 624-625 (7th Cir. 1987); *United States* v. *Larson*, 796 F.2d 244 (8th Cir. 1986); *United States*

v. *Reinis*, 794 F.2d 506, 508 (9th Cir. 1986); *United States* v. *Varbel*, 780 F.2d 758 (9th Cir. 1986); *United States* v. *Anzalone*, 766 F.2d 676 (1st Cir. 1985).

Whatever the merit of the latter decisions in construing Section 5313, Congress has totally revised the law in this area by enacting the Money Laundering Control Act of 1986. The explicit purpose of the new Act was to overrule the decisions in *Anzalone* and *Varbel* and to codify the decision in *Tobon-Builes*, on which the court relied in the present case. Section 1354(a) of the Act, entitled "Structuring Transactions to Evade Reporting Requirements Prohibited," creates a new section of Title 31 (Section 5324), which provides as follows:

> No person shall for the purpose of evading the reporting requirements of Section 5313(a) with respect to such transaction—
>
> (1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a);
>
> (2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) that contains a material omission or misstatement of fact; or
>
> (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

By its terms, the statute imposes criminal liability for causing a financial institution to fail to file a CTR, as well as for structuring deposits, as petitioners did here, for the purpose of evading the reporting requirements of Section 5313. In formalizing these statutory obligations, Congress made clear that its

purpose was to overrule the First and Ninth Circuit decisions in *United States* v. *Anzalone*, *supra*, and *United States* v. *Varbel*, *supra*, and the Eleventh Circuit decision in *United States* v. *Denemark*, 779 F.2d 1559 (1986). The Senate Committee on the Judiciary, reporting favorably on an identical provision in S. 2683, 99th Cong., 2d Sess. (1986), an earlier version of the money laundering bill, stated (S. Rep. No. 433, 99th Cong., 2d Sess. 21-22 (1986)):

> Under present law, money launderers are successfully prosecuted in some judicial circuits for causing financial institutions not to file reports on multiple currency transactions totaling more than $10,000 or causing financial institutions to file incorrect reports. In such cases, the actual money launderers are charged with violations of 18 U.S.C. 2 (aiding and abetting or causing another to commit an offense) and section 1001 (concealing from the Government a material fact by a trick, scheme, or device). For example, in *United States* v. *Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983), the Eleventh Circuit Court of Appeals upheld a conviction under 18 U.S.C. 1001 where the defendants had engaged in a money laundering scheme in which they had structured a series of currency transactions, each one less than $10,000 but totalling more than $10,000, to evade the reporting requirements. * * * In contrast, the First Circuit Court of Appeals, in *United States* v. *Anzalone*, 766 F.2d 676 (1st Cir. 1985), the Eleventh Circuit Court of Appeals in *United States* v. *Denemark*, 779 F.2d 1559 (11th Cir. 1986), and the Ninth Circuit Court of Appeals in *United States* v. *Varbel*, 780 F.2d 758 (9th Cir. 1986) have held that structuring currency transactions to avoid the

> reporting requirements did not violate 18 U.S.C. section 1001.
>
> Subsection (h) would codify *Tobon-Builes* and like cases and would negate the effect of *Anzalone*, *Varbel* and *Denemark*. It would expressly subject to potential liability a person who causes or attempts to cause a financial institution to fail to file a required report or who causes a financial institution to file a required report that contains material omissions or misstatements of fact. In addition, the proposed amendment would create the offense of structuring a transaction to evade the reporting requirements, without regard to whether an individual transaction is, itself, reportable under the Bank Secrecy Act.

The House intended precisely the same results when it formulated a virtually identical version of the money laundering provisions. The Committee on Banking, Finance and Urban Affairs stated (H.R. Rep. No. 746, 99th Cong., 2d Sess. 18-19 (1986)):

> In some judicial circuits, money launderers have been successfully prosecuted for causing financial institutions not to file reports on such multiple currency transactions. In such cases, defendants are charged with violations of 18 U.S.C. 2 (aiding and abetting or causing another to commit an offense) and Section 1001 (concealing from the government a material fact by a trick, scheme, or device).[4]
>
> In contrast, other cases have held that the Act and its regulations impose no duty on the cus-

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[4] For this proposition, the House Report cited the Eleventh Circuit's decision in *Tobon-Builes* (H.R. Rep. No. 746, *supra*, at 18 n.1).

> tomer to inform the financial institution of the structured nature of the transactions, that the reporting duties are placed solely upon the financial institution, and therefore, only a financial institution can directly violate the reporting requirements.[5]
>
> The Committee believes that Section 2 of H.R. 5176 would resolve the legal issues raised by the various circuit courts by expressly subjecting to potential liability a person who causes or attempts to cause a financial institution to fail to file a required report or who causes a financial institution to file a required report that contains material omissions or misstatements of fact. In addition, it would create the offense of structuring a transaction to evade the reporting requirements, without regard for whether an individual transaction is, itself, reportable under the Bank Secrecy Act.

In light of this new legislation, there is no reason to expect that the previous conflict among the circuits will persist. Accordingly, review by this Court is unwarranted.

b. In any event, the court of appeals' decision is correct under the law as it existed prior to the enactment of the Money Laundering Control Act of 1986.

The court below adopted the rationale of the Eleventh Circuit in *Tobon-Builes* (Pet. App. 18). In *Tobon-Builes*, the court held that although the duty to file CTRs is imposed only on financial institutions, a third party who causes the institution to violate its duties by structuring transactions may be convicted

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[5] For this proposition, the House Report cited, *inter alia*, *Anzalone* and *Varbel* (H.R. Rep. No. 746, *supra*, at 19 n.2).

under 18 U.S.C. 2(b).[6] That holding comports with the broad language of Section 2(b), which extends liability to anyone who "causes an act to be done which if directly performed by him or another would be an offense against the United States." As the reviser's note to 18 U.S.C. 2 states, the aiding and abetting statute

> removes all doubt that one who puts in motion or assists in the illegal enterprise or causes the commission of an indispensable element of the offense by an innocent agent or instrumentality, is guilty as a principal even though he intentionally refrained from the direct act constituting the completed offense.[7]

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[6] Correspondingly, third parties who, like petitioners, conspire to cause a bank to violate its reporting obligations may be convicted under 18 U.S.C. 371. See *United States* v. *Sans*, 731 F.2d 1521, 1530-1532 (11th Cir. 1984), cert. denied, 469 U.S. 1111 (1985); *United States* v. *Lester*, 363 F.2d 68, 73-74 (6th Cir. 1966), cert. denied, 385 U.S. 1002 (1967).

[7] The reviser's note also indicates that Section 2 was intended to embrace this Court's decision in *United States* v. *Giles*, 300 U.S. 41, 43 (1937). There, the Court upheld the conviction of a bank teller under a statute that prohibited bank employees from "mak[ing] any false entry in any book * * * of [a] Federal reserve bank or member bank." The defendant was convicted of having caused a bookkeeper for the bank to make false deposit entries in the bank's ledger, by wrongfully withholding from circulation certain deposit slips prepared for particular bank customers. Although the defendant had not himself made the false entries, and although the "innocent bookkeeper was the teller's * * * unconscious agent," the Court held that "the statute [was] broad enough to include deliberate action from which a false entry by an innocent intermediary necessarily follows" (300 U.S. at 48-49). So, too, for Section 2(b): it applies even where the defendant, by his actions, causes an innocent intermediary

Those principles apply here as well. Although the use of structured deposits may prevent various banks from learning of their duty to file CTRs, a bank customer's success in that endeavor cannot shield him from liability under Section 2(b). Similarly, by agreeing to cause such structured deposits, petitioners were lawfully convicted of conspiracy, in violation of 18 U.S.C. 371.[8]

2. Petitioners renew their claims that all the records seized from AIP's offices should have been suppressed because the warrant was overbroad and because the agents conducted an unconstitutional general search in flagrant disregard of the warrant. Pet. 22-26. The court of appeals' ruling to the contrary presents no issue of general importance and thus does not warrant review by this Court.

a. The warrant in this case was not unconstitutionally overbroad. It is well settled that where the

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unwittingly to violate the law. Accord *United States* v. *Ruffin*, 613 F.2d 408, 412-413 (3d Cir. 1979); *United States* v. *Catena*, 500 F.2d 1319, 1322-1323 (2d Cir.), cert. denied, 419 U.S. 1047 (1974); *United States* v. *Levine*, 457 F.2d 1186, 1188-1189 (10th Cir. 1972); *United States* v. *Lester*, *supra*.

[8] Because petitioners were lawfully convicted for causing PNB to fail to file CTRs, their challenge (Pet. 20-21) to the jury instructions on the conspiracy count is meritless. In any event, petitioners were convicted on substantive counts corresponding to overt acts falling within both objects charged in the conspiracy count; it follows that the jury necessarily convicted petitioners on both of the charged objects. Finally, petitioners' claim (Pet. 21) that the allegedly erroneous convictions on the conspiracy count could have spilled over to the otherwise unchallenged AIP counts (counts 2-47) is frivolous. Counts 2-47 related solely to AIP's own failure to file CTRs; those counts had nothing to do with causing PNB to fail to file CTRs.

underlying affidavit establishes sufficiently broad probable cause, the warrant may authorize a comparably broad search and seizure. See *United States* v. *Hershenow*, 680 F.2d 847, 851 (1st Cir. 1982) ("[t]he particularity and probable cause requirements of the Fourth Amendment are * * * closely related"); see also *In re Impounded Case (Law Firm)*, 840 F.2d 196, 200 (3d Cir. 1988); *United States* v. *Christine*, 687 F.2d 749, 758 (3d Cir. 1982). Courts have accordingly approved property descriptions in search warrants that were as broad in scope as the probable cause demonstration in the supporting affidavit. In addition, since the scope of some forms of criminal activity, such as broad money laundering schemes, can be detected only by piecing together myriad financial documents, and since officers often do not know in advance what documents they may find, the courts have applied the particularity requirement with sufficient flexibility to allow the seizure of generically described documents.[9]

As the court below found, Pet. App. 44, the warrant affidavit "clearly supported the fact that a broad range of documents would be entailed in sorting out the details of this sophisticated scheme." Agent Tate's affidavit (*id.* at 79-103) detailed a pervasive money laundering scheme, and it showed that the

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[9] See, *e.g.*, *In re Search of 4801 Fyler Ave.*, 879 F.2d 385 (8th Cir. 1989) (any "correspondence, records, files, work orders, logs, or other documents" relating to hazardous wastes); *United States* v. *Brown*, 832 F.2d 991 (7th Cir. 1987) (generically described business records relating to fraudulent insurance claims), cert. denied, 108 S. Ct. 1084 (1988); *United States* v. *Kail*, 804 F.2d 441 (8th Cir. 1986) (warrant for almost all the defendant's business records); *United States* v. *Brien*, 617 F.2d 299, 306 (1st Cir.) (same), cert. denied, 446 U.S. 919 (1980).

scheme would be reflected in a wide array of records. In light of that showing, the court of appeals was plainly correct in concluding (*id.* at 45) that "[i]t is not unreasonable that a large bulk of American Investors' business dealings may have been influenced by the scheme." As the court put it, "[g]iven the complex nature of a money-laundering enterprise," it cannot be said that the search warrant "over-described the extent of the evidence sought to be seized" (*id.* at 44).

Nor, as petitioners contend (Pet. 23), does the final, general reference in the warrant to the CTR and conspiracy statutes render the warrant over-broad. That general provision follows a list of 19 specific categories of documents to be seized. As this Court has noted, a general reference in a search warrant must be construed in light of prior specific categories. See *Andresen* v. *Maryland*, 427 U.S. 463, 479-482 (1976). Under that standard, the search warrant in this case was sufficiently particular.[10]

b. Even if the warrant in this case was over-broad, the agents acted in good faith in obtaining it, and the evidence seized was therefore properly held admissible under this Court's decisions in *United States* v. *Leon*, 468 U.S. 896 (1984), and *Massachusetts* v. *Sheppard*, 468 U.S. 981 (1984). In *Leon*, this Court held that the exclusionary rule "cannot be expected and should not apply, to deter objectively reasonable law enforcement activity." 468 U.S. at 919. The court reasoned that, if an officer has ob-

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[10] Because the warrant in this case did not authorize a search simply "with reference to a broad federal statute" (Pet. 23)—but instead delineated 19 precise categories of records—petitioners' reliance on the decisions cited at page 23 of the petition is misplaced.

tained a warrant, the deterrent value of the exclusionary rule is vitiated by the fact that the officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the search warrant is technically sufficient. *Id.* at 921.

The good faith exception may apply even if a search warrant is overbroad or fails to describe the things to be seized with sufficient particularity. The Court's decision in *Massachusetts* v. *Sheppard*, *supra*, makes that clear. In *Sheppard*, the trial judge suppressed evidence seized during the execution of a search warrant that incorrectly identified the items to be seized as evidence of a narcotics transaction, rather than a murder. Relying on *Leon*, this Court reversed, emphasizing that the officers had demonstrated their good faith by submitting an affidavit to a judge and thereafter relying on the judge's determination that the warrant he issued was sufficiently particularized. 468 U.S. at 989-991. See also *Illinois* v. *Krull*, 480 U.S. 340 (1987) (applying *Leon* to a state law, later held invalid, that authorized a warrantless search, even though the statute could have been more narrowly drawn).

The same considerations that prompted this Court to apply the good faith exception in *Leon*, *Sheppard*, and *Krull* are also present here. The court of appeals determined, correctly in our view, that the warrant was not overbroad; the district court, although finding the warrant overbroad in some respects, nonetheless found that the case was close and the question difficult (see Pet. App. 64). The requirement that a warrant contain a particularized description of the property to be searched includes "a practical margin of flexibility" depending on the facts in each case.

United States v. *Wuagneux*, 683 F.2d 1343, 1349 (11th Cir. 1982) (collecting cases), cert. denied, 464 U.S. 814 (1983). That is especially true in cases "involving complex financial transactions." *Ibid.*[11] In short, the warrant, if deficient at all, was not so "facially deficient" that the executing officers could not have reasonably presumed that it was valid. See *United States* v. *Luk*, 859 F.2d 667, 677-678 (9th Cir. 1988); *United States* v. *Kepner*, 843 F.2d 755, 763-764 (3d Cir. 1988); *United States* v. *Diaz*, 841 F.2d 1, 6 (1st Cir. 1988); *United States* v. *Gros*, 824 F.2d 1487 (6th Cir. 1987); *United States* v. *Buck*, 813 F.2d 588, 592-593 (2d Cir.), cert. denied, 108 S. Ct. 167 (1987); *United States* v. *Michaelian*, 803 F.2d 1042, 1046-1047 (9th Cir. 1986); *United States* v. *Weinstein*, 762 F.2d 1522, 1531 (11th Cir. 1985), cert. denied, 475 U.S. 1110 (1986).

Contrary to petitioners' contention (Pet. 26), the fact that the officers may have seized some records that were beyond the scope of the warrant does not make the good faith exception in *Leon* unavailable. Instead, the question whether all the evidence must be suppressed depends upon whether the officers acted in flagrant disregard of the warrant. See *United States* v. *Tamura*, 694 F.2d 591, 597 (9th Cir. 1982); *United States* v. *Christine*, *supra*. Affirming the findings of the trial court (Pet. App. 67-68), the court of appeals correctly held (*id.* at 48) that there was no such flagrant disregard in this case. To execute

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[11] As this Court has recognized with respect to the particularity requirement, "the complexity of an illegal scheme may not be used as a shield to avoid detection when the State has demonstrated probable cause to believe that * * * evidence of [a] crime is in the suspect's possession." *Andresen* v. *Maryland*, 427 U.S. at 480-481 n.10.

the warrant in this case, the agents were required to search all of AIP's records in order to identify the items to be seized. In making the actual seizure, moreover, the agents could reasonably select not only the specific records identified in the warrant, but also ledgers and file folders that contained the specified records—even if not all of the information in the ledgers or folders was covered by the warrant. *United States* v. *Christine*, 687 F.2d at 760; see also *United States* v. *Beusch*, 596 F.2d 871 (9th Cir. 1979). And the agents exercised considerable restraint in undertaking the authorized seizure—employing 37 agents, over a 10-hour period, and obtaining consent to search a storage area not expressly covered by the warrant.[12] The courts below were therefore plainly correct in refusing to order the suppression of all of the seized evidence on the ground that the agents may have seized certain records not within the ambit of the warrant.[13]

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[12] By contrast, it required petitioners' expert some 400 hours of examining the seized records to conclude that 46,000 documents were not properly seized under the warrant. Gov't C.A. Br. 51.

[13] By contrast, the search in *United States* v. *Medlin*, 842 F.2d 1194, 1197 (10th Cir. 1988), on which petitioners rely (Pet. 24, 26), far exceeded the scope of the warrant, and thus the court in that case held that the scope of the search undermined the particularity of the warrant.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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